DOCUMENT RESUME

ED 432 202 HE 032 196

AUTHOR	Johnson, Beth H., Ed.
TITLE	Silver Anniversary Conference: 25 Years of Higher Education Collective Bargaining. Proceedings of the Annual Conference of the National Center for the Study of Collective Bargaining in Higher Education and the Professions. School of Public Affairs, Baruch College, City University of New York (25th, New York, NY, April 1997).
INSTITUTION	City Univ. of New York, NY. Bernard Baruch Coll. National Center for the Study of Collective Bargaining in Higher Education and the Professions.
ISBN	ISBN-911259-35-X
ISSN	ISSN-0742-3667
PUB DATE	1997-00-00
NOTE	233p.; For previous edition, see ED 409 814.
AVAILABLE FROM	National Center for the Study of Collective Bargaining in Higher Education and the Professions, Baruch College, CUNY, 17 Lexington Ave., New York, NY 10010 ($45).
PUB TYPE	Collected Works - Proceedings (021)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Collective Bargaining; College Administration; *College Faculty; Educational Finance; Faculty College Relationship; *Higher Education; *Labor Relations; *Legal Problems; Technology; Tenure; Unions

ABSTRACT

The 21 papers in this proceedings document are grouped into six sections which discuss the future of the U.S. labor movement; the future of tenure; faculty, unions, and management; technology and collective bargaining; fiscal problems in higher education; and legal issues in higher education. The papers are: (1) "Labor Relations for the 21st Century" (William B. Gould); (2) "The Revitalization of the U.S. Labor Movement: Can 21st Century Cyberunions Be Created in Time? Or Will Cyberunions Compute?" (Arthur B. Shostak); (3) "The Future of Tenure: Moving Beyond Polemics" (Henry Lee Allen); (4) "Academic Tenure: Between All or Nothing" (Richard Chait); (5) "The Assault on Faculty Independence" (Matthew W. Finkin); (6) "A Case for the Renewal of Tenure" (Jean B. Keffeler); (7) "The Regents in Higher Education" (Saul B. Cohen); (8) "Faculty and Management Rights in Higher Education Collective Bargaining: A Faculty Perspective" (Ernst Benjamin); (9) "Twenty-five Years of Collective Bargaining: A Trustee's Perspective" (Candace de Russy); (10) "Faculty and Management Rights in Higher Education Labor Relations" (Caesar J. Naples); (11) "Authority for What?" (William E. Scheuerman); (12) "The Role of the University President in Contemporary Institutional Governance" (Michael Schwartz); (13) "Technology in Higher Education: Bargaining Quality" (Rachel Hendrickson); (14) "Teaming Up with Technology: How Unions Can Harness the Technology Revolution on Campus" (Mitchell Vogel); (15) "Continuing Fiscal Crisis in Higher Education" (Richard F. Rothbard); (16) "The Mutation of Higher Education and Reconfiguration of the Faculty and Their Roles" (Jack H. Schuster); (17) "Collective Bargaining and the Courts: An Empirical Analysis of Judicial Review of NLRB Decisions and Arbitration Awards" (Richard N. Block); (18) "Why Plaintiff's Attorney Should Avoid the Americans with Disabilities Act But Utilize the Family and Medical Leave Act" (Robert David Goodstein); (19)

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"Compliance with Family and Medical Leave Act and the Americans with Disabilities Act: Issues for College Faculty" (Barbara A. Lee); (20) "Significant Legal Developments Affecting Higher Education, 1996-1997" (James L. Cowden); (21) "Annual Legal Update: An Administration Perspective" (Nicholas DiGiovanni, Jr.). (Some papers contain references.) (DB)

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SILVER ANNIVERSARY CONFERENCE:
25 YEARS OF HIGHER EDUCATION COLLECTIVE BARGAINING

ED 432 202

Proceedings
Twenty-Fifth Annual Conference
April 1997

BETH H. JOHNSON, Editor
VICTOR GOTBAUM, Director

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School of Public Affairs, Baruch College
The City University of New York

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Price: $45.00

ISSN 0742-3667
ISBN 911259-35-X

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INTRODUCTION

Since 1972, the National Center for the Study of Collective Bargaining in Higher Education and the Professions has provided labor and management practitioners and scholars with the finest research in higher education collective bargaining. Housed in and supported by Baruch College of The City University of New York (CUNY), in its School of Public Affairs, the National Center is the only research center of its kind in the United States, specializing in the production and publication of important information and analyses about labor-management relations at the academy.

This year the National Center is celebrating its twenty-fifth year of serving the higher education collective bargaining community with its conference entitled, **Silver Anniversary Conference: 25 Years of Higher Education Collective Bargaining**. We attempted in this conference program to include both a retrospective and prospective look at collective bargaining in higher education (CBHE). The keynote presentation by Chairman William B. Gould IV, of the National Labor Relations Board outlined key issues to be looked at in the coming years including a possible reconsideration of *Yeshiva*. Theodore Kheel, a noted expert in labor relations and conflict resolution, gave a special silver anniversary lecture on overcoming practical obstacles to higher education collective bargaining. Our luncheon presentation on the first day of the conference dealt with the role of the New York State Regents, presented by Regent, Saul B. Cohen. On day two, Randy L. Levine, Chief Labor Negotiator for Major League Baseball, gave us the details as to the settlement of the Major League Baseball strike.

A number of other panels were presented on various topics concerning higher education collective bargaining. The future of tenure in the academy has recently been challenged as never before. We brought together scholars and practitioners on both sides of the issue to discuss this topic of grave importance to all faculty and their institutions. The integration of technology into the educational programs of our colleges and universities has presented challenges to administrations and faculty which are beginning to be addressed in collective bargaining negotiations and subsequent contracts. Several participants spoke to these issues. Two sessions dealt with challenges to the academy due to the public policy retreat and continuing fiscal cutbacks. Some recent voices in the debate on higher education have suggested that there is a need to restore authority within institutions of higher education while others argue that proper authority is currently established, and needs only to be continued. Panelists discuss the need for strong leadership in higher education from the perspective of presidents, faculty unions, and trustees. Human relations scholars and practitioners presented ideas on compliance with the Family and Medical Leave Act and the Americans with Disabilities Act. Our annual review of legal cases affecting the academy was presented by one labor and one management attorney from their different perspectives. A special panel on court challenges was explored by a labor representative, a management person, and a scholar. In keeping with our overall theme of **25 Years of Higher Education Collective Bargaining**, one session

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examined faculty and management rights in higher education collective bargaining from a historical perspective as well as current challenges.

THE PROGRAM

Set forth below is the program of the Twenty-Fifth Annual Conference listing the topics and speakers. Some editorial liberty was taken with respect to format in order to ensure readability and consistency. If an author was unable to submit a paper, the name appears on the program, but the remarks have been omitted. Opinions expressed in the papers are those of the authors, not necessarily their organizations or of NCSCBHEP.

MONDAY, APRIL 14, 1997

8:30 REGISTRATION and COFFEE

9:15 WELCOME

Douglas H. White, Director
NCSCBHEP, Baruch College

Ronald M. Berkman, Dean
School of Pub. Affairs, Baruch Col.

9:30 KEYNOTE
LABOR RELATIONS FOR THE 21ST CENTURY

Speaker: William B. Gould IV, Chairman
National Labor Relations Board

Presiding: Lois S. Cronholm, Provost
Baruch College, CUNY

10:30 SILVER ANNIVERSARY LECTURE
OVERCOMING THE PRACTICAL OBSTACLES TO HIGHER EDUCATION COLLECTIVE BARGAINING

Speaker: Theodore Kheel, President
Foundation for Prevention & Early
Resolution of Conflict

Presiding: Ronald M. Berkman, Dean
School of Pub. Affairs, Baruch Col.

11:30 CONCURRENT SESSION A
RESPONDING TO THE PUBLIC POLICY RETREAT

Speakers:	Irwin Polishook, President Professional Staff Congress, CUNY AAUP/AFT
	Jack H. Schuster, Prof., Ed & Pub. Policy, Claremont Grad. School
	Arthur Shostak, Professor Sociology, Drexel Univ.
Moderator:	Thomas Mannix, Former Assoc. V. Chan. Employee Rels., SUNY

11:30 CONCURRENT SESSION B
FACULTY & MANAGEMENT RIGHTS IN HIGHER EDUCATION COLLECTIVE BARGAINING

Speakers:	Stanley Aronowitz, Prof., Sociology Grad. Center, CUNY, AAUP/AFT
	Ernst Benjamin, Associate General Secretary, AAUP
	Caesar Naples, V. Chan. Emeritus & Trustee Prof., Cal. State Univ.
Moderator:	Julius Manson, Prof. Emeritus Baruch College, CUNY

1:00 LUNCHEON
SILVER ANNIVERSARY LECTURE
THE REGENTS IN HIGHER EDUCATION

Speaker:	Saul B. Cohen, Member New York State Regents
Presiding:	Matthew Goldstein, President Baruch College, CUNY

2:30 CONCURRENT SESSION C
RESTORING AUTHORITY: THE NEED FOR STRONG PRESIDENTS, FACULTY UNIONS, AND TRUSTEES

Speakers:	Candace de Russy, Trustee State University of New York

William Scheuerman, President
United Univ. Profs., SUNY, AFT

Michael Schwartz, Prof. Higher Ed
Admin., Former Pres. Kent State U

Moderator: Joel M. Douglas, Prof., Public
Affairs, Baruch College, CUNY

2:30 CONCURRENT SESSION D
THE CONTINUING FISCAL CRISIS IN HIGHER EDUCATION

Speakers: David Breneman, Dean, Curry
School of Education, U. of Virginia

Richard Rothbard, V. Chan.
Budget & Finance, CUNY

Kathy Sproles, President
Calif. Comm. Col. Assn., NEA

Moderator: James Begin, Prof., Human
Resource Mgt., Rutgers Univ.

4:00 PLENARY SESSION E
ANNUAL LEGAL UPDATE

Speakers: James Cowden, Esq., Strokoff &
Cowden, APSCUF, AFT

Nicholas DiGiovanni, Esq.
Morgan, Brown, & Joy, Boston

Moderator: Linda Chin, Dean of Faculty &
Labor Rels., Hunter Col., CUNY

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5:00 RECEPTION

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TUESDAY, APRIL 15, 1997

9:30 CONCURRENT SESSION F
SEE YOU IN COURT: COLLECTIVE BARGAINING AND LITIGATION

Speakers: Frank R. Annunziato, Exec. Dir.
Professional Staff Congress, CUNY
AAUP/AFT

Jean Ambrose, Asst. V. P.
Faculty Affairs, Rutgers Univ.

Richard Block, Arbitrator & Prof.
Labor & Ind. Rels., Mich. State U.

Moderator: VirginiaAnn Shadwick, Bd. of Dir.
Calif. Teachers Assn., NEA

9:30 CONCURRENT SESSION G
COMPLIANCE WITH FMLA & ADA

Speakers: Robert Goodstein, Esq., Goodstein
and West, New Rochelle, NY

Barbara Lee, Prof., Mgt. & Ind.
Rels., Rutgers Univ.

Alvin Vinson, Dir., Human Res.
Hoffmann-LaRoche Pharmaceuticals

Moderator: John Dugan, Jr., Dean, Faculty &
Staff Rels., Baruch College, CUNY

11:00 CONCURRENT SESSION H
THE FUTURE OF TENURE

Speakers: Henry Allen, Prof., Ed & Human
Dev., U. of Rochester, NEA

Richard Chait, Professor
School of Ed., Harvard Univ.

Matthew Finkin, Prof. of Law
Univ. of Illinois, AAUP

Jean Keffeler, Former Regent
Univ. of Minnesota

Moderator: John McGarraghy, Prof., Higher
Ed. Admin., Baruch College

11:00 CONCURRENT SESSION I
TECHNOLOGY ISSUES AND HIGHER EDUCATION
COLLECTIVE BARGAINING

Speakers: Maurice Benewitz, Arbitrator,
Founding Director, NCSCBHEP

Rachel Henrickson, Organizational
Specialist, NEA

Mitchell Vogel, President, Univ.
Professionals of Illinois, AFT

Moderator: Theodore H. Lang, Arbitrator
Former Director, NCSCBHEP

1:00 LUNCHEON
SILVER ANNIVERSARY LECTURE
WHAT ACADEME CAN LEARN FROM
MAJOR LEAGUE BASEBALL

Speaker: Randy L. Levine, Chief Labor
Negotiator, Major League Baseball

Presiding: Douglas H. White, Director
NCSCBHEP, Baruch College

3:30 SUMMATION AND ADJOURNMENT

A WORD ABOUT THE NATIONAL CENTER

The National Center is an impartial, nonprofit educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in colleges and universities. The National Center is a part of the School of Public Affairs of Baruch College, The City University of New York. The Center addresses its research to scholars and practitioners in the field. Membership consists of institutions and individuals from all regions of the U.S. and Canada. Activities are financed primarily by membership, conference and workshop fees, foundation grants, and income from various services and publications made available to members and the public. Among the activities are:

- An annual Spring Conference.
- Publication of the Proceedings of the Annual Conference, containing texts of all major papers.
- Issuance of an annual Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education.
- An annual Bibliography, Collective Bargaining in Higher Education and the Professions.

- The National Center Newsletter, issued four times a year, providing in-depth analysis of trends, current developments, major decisions of courts and regulatory bodies, updates of contract negotiations and selection of bargaining agents, reviews and listings of publications in the field.

- Monographs -- complete coverage of a major problem or area, sometimes of book length.

- Elias Lieberman Higher Education Contract Library maintained by the National Center, containing more than 300 college and university collective bargaining agreements, important books and relevant research reports.

ACKNOWLEDGMENTS

Members of the National Center's National Advisory Committee and our Baruch College Faculty Advisory Committee provided us with terrific ideas for speakers and topics for the conference. Douglas White, the then Director of the National Center, along with, Baruch College professors Joel Douglas, Frederick Lane, and John McGarraghy provided important suggestions, encouragement, and support throughout the many months of conference preparation. We are, of course, grateful to all of the speakers and moderators who so ably presented papers and guided the conduct of sessions. A thank you is also due to the Center's two College Assistants. Carol Juge spent several months inputting, proof reading, and assisting in copy editing much of this volume. Daliah Farrar participated in the proof reading process. The Proceedings and Conference are a group effort, and I gratefully acknowledge the help of all of those who assisted.

We are also happy to welcome Victor Gotbaum as the new Director of the National Center and look forward to his participation in the activities of the Center.

Beth Hillman Johnson
Administrative Director

I. THE FUTURE OF THE U.S. LABOR MOVEMENT

A. Labor Relations for the 21st Century

B. The Revitalization of the U.S. Labor Movement: Can 21st Century Cyberunions be Created in Time? or Will Cyberunions Compute?

THE FUTURE OF THE U.S. LABOR MOVEMENT

A. LABOR RELATIONS FOR THE 21ST CENTURY

William B. Gould IV, Chairman
National Labor Relations Board

To my knowledge the Baruch College National Center for the Study of Collective Bargaining in Higher Education and the Professions is a unique institution and is one that is concerned with a subject which is timely for us and for other institutions and, perhaps, more so now than at anytime since its founding in 1972.

I have to say that 1972 is a particularly important year for me because it is the year that I began to work on the faculty at Stanford Law School where I had been until I took my current position as Chairman of the National Labor Relations Board. And I want you to know how much I am honored to be on the same program with Ted Kheel, for whom I worked as a young lawyer 30 years ago, and who has really been a mentor to me at the time that I was in practice with his law firm here in New York City, and an inspiration for me both then and in the years subsequent to working under him.

Ted really started me off in this arbitration world having me sit in for him in the summer of 1965 as a hearing officer in a ferry boat dispute under the old Condon-Wadlin Act which preceded the New York Taylor Act of 1967, and also got me involved in hearings when he was too busy with other matters -- the transit maritime and pocketbook industry arbitrations. And so, when I think of how I got going in this arbitration business, I think of my work for Ted Kheel and I am very grateful to him.

Of course, it is a great occasion here in New York City to be able to speak here on the eve of the 50th anniversary of Jackie Robinson's first appearance in major league baseball with the Brooklyn Dodgers. I remember that occasion well. I was ten years old in New Jersey and watching that so intensely -- and I remember that when I came home for dinner my father -- who had absolutely no interest in baseball whatever -- said to me, when the Dodgers came to New York for the Subway Series between the Yankees and the Dodgers which preceded the regular season opening game, "Robinson knocked one in today -- with a sacrifice fly." So many of us owe so much to Jackie Robinson.

I am honored to speak at an institution named for a distinguished American baseball player and alumnus of the City College freshman class of 1884. Bernard Baruch is fascinating not only because he was an adviser to six Presidents from President Wilson to President Truman, but also because he was a multi-millionaire financier and philanthropist, and also he was a baseball player with the City College team, and -- along with star pitcher Doc Fuentes, a professor of Spanish at City College, -- was a member of that baseball team.

I want to talk with you today about some of the issues that we are attempting to deal with at the National Labor Relations Board -- issues which I think have broad policy importance which will be with us in this coming century which, of course, is just right around the corner. We are faced with a number of important issues and I want to talk to you about four or five of the more important matters that are before us and then tell you a little bit about how we are trying to come to grips with this basic problem of delay and delivery of our service.

You know, I feel very lucky to have worked for two very distinguished men in the labor law field. I mentioned Ted Kheel already. Another such person that I worked for was Frank McCulloch, who was the Chairman of the National Labor Relations Board during the Kennedy Administration. And when the President nominated me in 1993, and when I went before the Senate Labor and Human Resources Committee, I began to look back and see what other Chairmen and other individuals has said when they came before the Committee. I noted that Chairman McCulloch said in 1961 -- when President Kennedy nominated him -- that the number one problem in American labor law today is the problem of delay in the administrative process and how to function more effectively to redeem the promise which is contained in the preamble of the National Labor Relations Act, the right of all employees, within the meaning of our law, to engage in the practice and procedures of collective bargaining and to freely associate with one another for that purpose. I think that here now in 1997 and in 1994, when I began this job, that the problem of delivering on this basic promise still remains the number one problem that exists in labor law and for our Board. I shall return to this subject at the conclusion of my remarks.

Last week in Oakland, I spoke before the Oakland Chapter of the Industrial Relations Research Association about an issue that I think is going to be important in the coming months, years and in the coming century, i.e., alternative dispute resolution machinery and its relationship to our statute. I think that most of you know that the practice and procedure of grievance arbitration machinery in the organized sector of the economy has been a well accepted practice promoted by the Unites States Supreme Court through the important landmark Steelworkers Trilogy[1] cases and by decisions of my agency over the past forty years. The idea of peaceable procedures as a substitute for strife and as a substitute to the resort to self-help have been critical to the federal labor law policy for these past four decades.

But as the numbers of employees covered by collective bargaining practices has shrunk over these past four decades -- and it is a process that has really been going on since the late '50s, and early '60s -- the problem of what machinery, if any, will be at the disposal of such employees has begun to emerge. This is something that I am sure confronts many of you in higher education.

The advent of fair employment practice legislation in the mid-1960s and other legislation which followed in the wake of Title VII of the Civil Rights Act of 1964, and more recently since the early 1980s wrongful dismissal litigation, all brought these issues to the forefront. Wrongful dismissal proceeds, for the most part, under the common law of particular states rather than legislation enacted by the legislature itself -- and it has exacerbated this problem. Employers confronted with substantial damage and the prospect of damage awards before juries, and employees confronted with arduous and lengthy judicial procedures, have begun to look to alternative dispute resolution mechanisms.

We at the Board, I think, will be confronted with this issue in at least two basic contexts. The first round of cases that is coming before us involves so-called "mandatory" arbitration procedures where employees who are not covered by collective bargaining agreements are told they must -- either at the time of hire or subsequent to being hired -- sign an agreement which requires, frequently as a condition of employment, that they agree to a system of arbitration -- and that they agree, in some instances, not to file a charge with our agency, but rather to rely upon the arbitration procedure as the exclusive remedy; or, in some agreements, to use our agency subsequent to the arbitration procedure; to require employees to exhaust the machinery which is available to them.

The General Counsel of our agency who, in this context, is independent of us and who acts as a prosecutor who brings unfair labor practice charges to us, has issued complaints in a number of cases which involve the mandatory feature in the arbitration process. The General Counsel maintains in the complaints that he has issued, that this is unlawful because it in effect is a measure through which the employer retaliates against the employee for resorting to the Board procedures. But even when we get beyond this issue the question of what deference, if any, our agency should accord to procedures which exist outside the context of a collective bargaining agreement still remain. What is the measure of impartiality? What is the measure of determining whether the procedure is an adequate substitute or surrogate in some context under some circumstances for public law machinery which has been established by the Congress and by the state legislators? The question of how the arbitrator is chosen will be a critical element in making and determining whether or not we are going to defer, in my judgment, to such procedures. Is a procedure which is not devised to deal with the particular dispute in question, a procedure to which we should defer?

In the collective bargaining context we have always assumed that such a procedure is appropriate. That is to say that the union and the employer negotiate grievance arbitration machinery which is designed to cover a wide variety of disputes for the duration of the collective bargaining agreement. May a non-union procedure which has been established to cover a wide variety of disputes be deferred under federal labor law? Must the procedure have some expiration point as a collective bargaining agreement does? To what extent must employees be involved in the creation of the procedure? To what extent must employees be involved in the selection of the arbitrator? Who should the arbitrators be?

When I first began to write and speak about this subject of the relationship between arbitration and, at that time employment discrimination matters, most of my colleagues at the National Academy of Arbitrators in the late '60s and early '70s said, "Well, legislation or law has nothing to do with our role -- we are in the business of contract interpretation." "Now you have," they said to me, "these ideas that arbitrators should, through the no-discrimination provision of a collective bargaining agreement, rely upon public law standards -- but that's not our job. Our job is to adhere to contractual provisions."

Now, I think to some extent the debate and the assumptions about the debate have changed since the late '60s and early '70s. I think in the collective bargaining context --and the Supreme Court has given some push to this through its famous footnote in the Gardner-Denver decision in 1974[2] -- some arbitrators are, through the no-discrimination provision in the agreement, looking to public law standards.

What is the charge that the arbitrator has? To what extent may the arbitrator be required to look to public law as his or her standard for resolution of the dispute? What authority does the arbitrator have?

I said last week in Oakland that probably most arbitrators who have operated under collective bargaining agreements traditionally have the kind of remedial authority that we have at the Board. They have the authority in dismissal cases to reinstate. They have the authority to fashion a remedy which provides for back pay. More difficult problems arise under other statutes where now, by virtue of the Civil Rights Act of 1991, the amendments to the '64 statute, punitive damages are available under employment discrimination legislation. Arbitrators operating under collective bargaining agreements have been traditionally reticent and reluctant to use punitive damage relief as a remedy for a violation for breach of a collective bargaining agreement. To what extent must an arbitrator have authority which is comparable to the authority that a federal district judge would have under employment discrimination legislation or that the National Labor Relations Board would have under the National Labor Relations Act of 1935?

These are all issues that will come before us when we look at this question of deference. The question is what deference, if any, do we owe to procedures which are adopted outside the collective bargaining agreement?

Who pays for arbitration? I suggested last week in my speech in Oakland that the Board ought to look very carefully at a procedure -- although the question of what we do will depend upon all the circumstances of the case that is brought to us -- and ought to be reluctant to defer to a procedure where only one party establishes it. One of the strengths of arbitration under collective bargaining agreements has been that both sides pay. Now there are a number of difficulties outside a collective bargaining agreement and that is that outside a collective bargaining agreement you are dealing with more of an imbalance in terms of economic resources between the two sides. And perhaps that argues for a different approach than that which has been employed in the collective bargaining sector.

The other problem, of course, is the question of who is the party. You do not have a party on one side -- the employee side -- that will be involved in most instances in future arbitrations in the non-union sector. Thirteen years ago I chaired a committee in California that issued a report advocating the enactment of comprehensive wrongful discharge arbitration legislation in California and one of the concerns that we had was whether you are going to have a system that is truly impartial where only one side pays,[3] where it is likely that the arbitrator will see one side in the future but not see the other side, i.e., the individual employee.

So all of these issues are ones that will come before our agency when these cases, some of which may arise in cases where the General Counsel has issued a complaint already when these cases come before our agency in the future. Our only guideline is in essence the law that I have alluded to already that has emerged in a very different context -- a unionized context Steelworkers Trilogy and its progeny, as well as the Gardner-Denver decision of 1974 which said employees covered by a collective bargaining agreement have a right to a de novo suit. That is as to say, they can litigate everything that may have indeed been litigated or resolved by an arbitrator in a different proceeding in federal district court under Title VII because the Court said in Gardner-Denver that this is the statutory scheme which Congress adopted.

And then in the Gilmer[4] decision of 1991, the United States Supreme Court appears to have adopted a different approach to arbitration in a non-union setting. Gilmer has suggested that employees, in contrast to those who are covered by collective bargaining agreements, may be required to go to arbitration where the arbitration is part of the individual contract of employment. And I have said that the Court has suggested this because there is no precise holding by the Court in Gilmer. But much of the reasoning suggests that the Court is interested in a different approach for non-union cases as opposed to collective bargaining agreements.

A second issue which is going to come before us in the future months, I think, will involve many of you directly in higher education, i.e., the question of whether teaching assistants in universities are employees within the meaning of the National Labor Relations Act and whether, correspondingly, the organizations in which they are involved, are labor organizations which may file petitions for representation under Section 9 of our statute.

Some of you will know that the Board has confronted this issue in previous years. The General Counsel, again acting in his prosecutorial role, has issued a complaint in a case involving teaching assistants at Yale University, and that complaint will be heard by an administrative law judge and the administrative law judge will make a ruling and, absent a settlement, that matter will be appealed to our agency. Ironically, from my perspective having spent 22 years at the Leland Stanford Junior University, one of the lead cases is Leland Stanford Junior University,[5] which was decided by the Board in 1974.

The Board in 1974 held that so-called research assistants in the physics department at Stanford were not employees within the meaning of the law, and they relied upon a number of factors to come to the conclusion that they did in the Stanford case. Amongst them was the fact that all the teaching assistants were doctorate students; that the stipend that they received was part of an educational assistance package; that the money that they received was not taxed; and that all of them, as I have said, were Ph.D. candidates. We do not know at this point whether the General Counsel will ask the Board to reverse the holding in Stanford, or whether the General Counsel will rely upon facts which are different in Yale from Stanford. Everything about Stanford is different from Yale, so I suppose that there will be dissimilar facts, but at this point we do not know anything about this case and it will come before us later this year or the early part of the coming year.

I mentioned to Ted Kheel as I was coming in here that these days, I am confronted with a problem that my predecessors were not -- that Chairman McCulloch was not in his time -- and that is that we are quizzed fairly routinely, by those who hold the power of the purse in the Congress, i.e., the Appropriations Committee, about many of the things that we are doing. Congressman Porter of Illinois, the Chairman of the House Appropriations Subcommittee had a great deal of interest in the Yale University case and questioned the General Counsel, who had issued the complaint, about this case. The other case that Chairman Porter was particularly interested in was one involving the Cedars-Sinai Medical Center which was decided by the Board in the 1970s, where the Board, in the context of interns and physicians who were training, found them to be students and not employees within the meaning of the Act.[6]

A third major issue that we confront is the status of many professional employees and whether they will be found by our agency to be employees within the meaning of the law, or whether they will be found, by virtue of the fact that paraprofessionals or secretaries work under their supervision, to be supervisors and, therefore, excluded from the coverage of the statute. You are familiar, of course, with the Yeshiva decision which I had said, -- and this got me into a great deal of difficulty with many of those in the Senate for saying this -- that this was a bad decision or a wrong decision.[7] I continue to believe that it is a wrong decision and a bad decision which simply does not make sense under our statute. But we are obliged to within the parameters established by the United States Supreme Court, and we operate within the parameters of the Yeshiva decision. Yeshiva involved the question of whether the university professors employed by Yeshiva University could be regarded as employees within the meaning of the law or managerial employees excluded since the Supreme Court decision of the early '70s from the coverage of our statute.

You will look in vain in our statute for an exclusion which speaks of managerial employees. But the Supreme Court has read into our statute such an exclusion and Yeshiva, utilizing a fairly ambitious rationale, applied that exclusion to the world of universities. These cases which are now before us involve professionals both inside and outside a university setting, lawyers, professors and the question of whether they are employees or supervisors because so many professionals have individuals working for them, at least as secretaries, to whom they give a variety of instructions.

One of the issues that will arise in these cases will be what in fact is the authority of the professional, vis-a-vis the secretary or vis-a-vis the paraprofessional in determining whether they are an employee or professional. Legal Aid of Alameda County[8] case is the leading case which is before the Board on this issue. It has been before us for some period of time. I hope that it is an issue that we are able to speak on in the very near future because this case and this issue have been resolved for many years and we owe the public a prompt answer.

Contingent employees. We heard oral argument in December of last year on two very important parts of the contingent employee issue and one of them involves the question which the Board and the courts have confronted quite frequently in the past, i.e., how do we define independent contractors? What are the indicia which are appropriate? Our statute excludes many people from its coverage. It excludes supervisors, as I have said, managerial employees as an implied exception and independent contractors. Who is an independent contractor? How do we define an independent contractor? This is an issue that has arisen with greater frequency in traditionally well organized sectors of the economy, like trucking. The parties that appeared before us in December in a case involving this issue were trucking employers and the Teamsters.

The other issue is the use of temporary employees -- and the question of under what circumstances they will be able to participate in an NLRB secret ballot box election conducted by us. The press, I think, has mischaracterized the issue that is before us. Temporary employees, like part-time employees, who work more than 4 hours a week for an employer, are protected by our law so long as they are not to leave the enterprise at a fixed date. There is no question about this under existing precedent. The question that is before us is under what circumstances may/should temporary employees be able to participate in NLRB elections alongside of so-called permanent employees who are on the payroll of the employer to whom the temporary employees have been referred.

Classic illustration of this -- and it is only an illustration -- is General Motors. General Motors may employ a large number of production employees, skilled craftsmen, and make a determination for a variety of reasons, that it does not want to hire employees on its payroll directly. But it needs, in certain circumstances, additional personnel. and so it goes to Manpower to get employees who may be on the payroll of Manpower. There are a variety of arrangements where Manpower and General Motors, to use that illustration, get together.

The union comes in and petitions the Board to represent all of the employees, both temporaries and so-called permanents, stating to the Board that the individuals in question do the very same work, operate under the very same supervision and are subject to the very same employment rules. Frequently, but not always, their compensation may differ and the question is: "Is a grouping of employees which includes both permanent and temporary employees a grouping which is an appropriate unit for the purpose of an NLRB secret ballot election and for the collective bargaining process which follows in the wake of such a finding should a majority of the employees vote for representation?"

In the early 1970s the Board held that in order to have such an election where one group is being referred by another employer, both employers -- both Manpower and General Motors -- must provide their consent to having an election which groups their employees together, notwithstanding the fact that they are working in this hypothetical or at the premises of the General Motors Corporation. That is the so-called Greenhoot doctrine which was decided by the Labor Board in the early 1970s.[9]

The issue before us in the cases argued in December is the question of whether or not we should continue to adhere to the Greenhoot rule and to require consent by both employers in order to conduct an election which includes temporaries and permanents together under our procedures. And this issue, like many that are before us has attracted a great deal of attention and again correspondence from many Members of Congress, who have suggested to me that because we are not now at full strength -- we only have three members of the Board and two of them are recess appointees -- that we ought not resolve such an issue of broad policy import.

And then, penultimately, an issue which I think is going to be very important involves the relocation of enterprises both inside the United States and, in many instances, to countries abroad, where a union represents the employees and where a union wants to bargain with the employer about the decision to relocate before the decision to relocate is made. And the obligation, if any, of the employer to bargain with the union about this decision, which has such enormous implications for both the competitive strength of employers in the country and the job security of employees who are represented in this instance by a union.

The United States Supreme Court, in 1981, held that where an employer makes a decision to partially close -- and most have assumed to close the enterprise completely -- that there is no duty to bargain under our statute.[10] I think that that decision was wrong, but again we must operate within the parameters of what the Supreme Court has said. But the question of what the obligation is in a relocation was not decided by the United States Supreme Court, and I suggested prior to the time that

I came to the Board that the rules in place really do not provide a union or the employees very much opportunity to know what the motivation or predicate for the real decision is in many of these cases.[11]

My judgment has been for a number of years, and this is a view that underlies my analysis of a wide variety of issues, that employees ought to know about what the facts are in the enterprise in which they are employed. That they ought to know the economic facts of life. And that people ought to be able to make a decision based upon the realities that confront them. And this view is that the more information that the parties have the better chance -- by no means a guarantee -- that they will have to be able to dispose of their issues in some way which may, in some way, make sense to them. Information is an important part of the collective bargaining process. We hope to be dealing effectively with this question of what the ground rules are in relocations.

It is this view of mine that has carried over into the so-called employee participation cases which are the subject of debate involving the TEAM Act which is now pending before the United States Senate. Again, my view is that in the non-union environment as well, that we ought to be promoting genuine participatory mechanisms through which employees are able to know the real facts of life and that is what I suggested in my concurring opinion in the Keeler Brass case.[12]

Many of our initiatives have been focused in the past three years upon devising more effective mechanisms to deliver our product promptly. I issued a report a month ago which outlined the mechanisms that we have used. There are approximately half a dozen of them. They involve us in Washington, as well as what goes on in the field. And in the field we have tried to encourage our administrative law judges to move more promptly and effectively by, in some instances, giving the Chief Administrative Law Judge the authority to appoint someone who can mediate and conciliate -- act as a settlement judge -- without the authority to adjudicate. this is an approach that has been well accepted in private dispute resolution machinery for years -- the notion that if you are before someone who is not going to adjudicate -- but who only has the authority to mediate and conciliate -- you will be much more likely to be willing to offer concessions and tell that third party your secrets and your real position than you would if you were going to have to the next day go before that party who would be adjudicating. It does not take a rocket scientist to understand this and this is an approach that has been used in the resolution of disputes outside of public law for years.

And so what we are trying to do is to settle more cases -- and we have settled more than 200 in the two years that this procedure has been in existence -- through the settlement judge mechanism.

The other major procedure that we have used in the field is to allow the administrative law judges to issue bench decisions. I know that some of you who are lawyers are troubled by this idea, because what this does is allow the administrative law judges to issue decisions without the filing of briefs, based upon the oral summation of the parties having given the parties notification of this procedure prior to its invocation.

These cases that come before our agency are very tough cases. But they do not always involve complex legal issues, which require voluminous briefs by learned counsel. My father used to say to me when I was a little boy that it was very important, as I went through life, to look somebody right in the eye when I spoke to them because that way people will have more confidence in what you are saying. He said, "I want to tell you something else as well, and that is that there are going to be a lot of people who will be looking you right in your eye, as you go through life, and who will be lying through their teeth as the do it."

And I often think of this as I think of the problems that our poor administrative law judges are confronted with and I think of this from my days as an arbitrator before assuming this job. These are tough cases, but they no not always involve the need for the filing of detailed, voluminous briefs. They can be decided on the basis of credibility -- on the basis of which story rings true.

And then, finally, let me conclude by making some reference to our most controversial initiative, the one that seems to have attracted much attention and that is the use of Section 10(j) of our statute which authorizes the Board to go into federal district court and obtain temporary injunctive relief in connection with both employer and union unfair labor practice cases while the matter is pending before the administrative law judge and before the Board itself.

What difference does it make to an employee who has been unlawfully dismissed if he or she is going to be reinstated three or four years down the road? What difference does it make to the employees who have voted for the collective bargaining procedure now in 1997 if they know that the employer can only be obliged to bargain with them in the year 2000? Then the passage of time will erode the effectiveness of the remedy. What difference does it mean to the employer who is confronted with a violent picket line to have the Board tell the employer that a cease-and-desist order will be forthcoming in two years time? There are some cases which cry out for immediate relief and those are the cases in which we have attempted to use Section 10(j).

In the 1970s there was, as I think there will be again, a great debate in our country about labor law reform. The National Association of Manufacturers in its testimony to the Senate Labor Committee, as it was called then, said, in opposing the ideas that were put forward, "You don't need to have labor law reform because the main things you are concerned about, you advocates of labor law reform, are delay and the ineffectiveness of remedies which are exacerbated and exaggerated by delay. If you can get it resolved now you don't need that kind of deterrent and," said the National Association of Manufacturers, "you can get it resolved now, for the Board has at its disposal the tools to do it, Section 10(j) which has been in the statute since the Taft-Hartley Amendment of 1947."

And so we have tried to use this statutory provision. The statute promotes, as I have said, both the practice and procedure of collective bargaining and the principle and freedom of association amongst employees.

This has been a difficult, but a very exciting period.

I said to Ted Kheel when we walked into this room that this job is really a law professor's dream, but it is also the dream of someone who has always been interested in the political process but was never really directly involved in it and I am much more directly involved in the political process in dealing with Members of Congress than I ever could have dreamed when I sat in the beautiful sunshine of my backyard in Stanford, California four years ago when the White House first called me and asked me to assume the job.

The challenge of promoting the principles and policies of the Act is a great one. It is one that I would not have missed for anything.

ENDNOTES

1. United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960; United Steelworkers v. Warrior and Gulf Navigation Co., 363 u.S. 574 (1960); United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

2. Alexander v. Gardner-Denver, 415 U.S. 36 (1974).

3. Gould, Estes, Rudy, Wise, Hay, McClain, To Strike a New Balance, A report of the Adhoc Committee on Termination at Will and Wrongful Discharge Appointed by the Labor and Employment Law Section of the State Bar of California, February 8, 1984. (On file at Stanford Law School.) Mr. Hay and Ms. McClain, a former student of mine at Stanford law School and a member of the National Labor Relations Board Management Advisory Panel, dissented from some key portions of the report.

4. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

5. 214 NLRB 621 (1974).

6. Cedars-Sinai Medical Center, 223 NLRB 251 (1976).

7. Yeshiva University, 444 U.S. 672 (1980).

8. Cases 32-RM-657, 32-RC-3375.

9. Greenhoot, Inc., 205 NLRB 250 (1973).

10. First National Maintenance Corp. v. NLRB 452 U.S. 666 (1981).

11. Subsequent to this decision, we decided Q-1 Motor Express, Inc., 323 NLRB no. 142 (May 23, 1997), in which I wrote a concurring opinion on this issue.

12. 317 NLRB 1110, 1116 (1995).

THE FUTURE OF THE U.S. LABOR MOVEMENT

B. ON THE REVITALIZATION OF THE U.S. LABOR MOVEMENT: CAN 21ST CENTURY CYBERUNIONS BE CREATED IN TIME? OR WILL CYBERUNIONS COMPUTE?

Arthur B. Shostak
Professor of Sociology
Drexel University

If the Guiness Book of Records were to salute the fastest reversal of fortune in recent years by a major American organization, the AFL-CIO would be a clear contender for the title. Agent of its own breathless recovery, one that still astonishes its would-be pall bearers, the AFL-CIO has only "just begun to fight." It might yet even earn the renewal of its most strategic international union affiliates, this as formidable a challenge to it as anything posed by its harshest corporate and political critics.

As recently as two years ago, an AFL-CIO led by Lane Kirkland, and the labor movement as a whole, was widely dismissed as a hapless has-been, a dinosaur, a brain-damaged relic from the Age of Smokestack Industries, a Second Wave anachronism. It was fashionable to suspect labor was a lost cause, and many "Sunshine Soldiers and Summer Patriots" had no problem abandoning it.

Now, intemperate opponents accuse the Federation (AFL-CIO) or posing a clear and present danger to the Republic. Leading Republicans (Senators Robert Dole, Newt Gingrich, etc.) insist organized labor is once again a formidable foe of all that is right and proper. Anti-labor editorialists and their editorial cartoon cronies heap abuse on the heads of "Union Bosses," and conservative syndicated columnists (George F. Will, William Raspberry, etc.) renew their once-lapsed attack against "Big Labor," union goons, compulsory unionism, and other such matters.

Further evidence of labor's new significance comes from the opposite end of the political spectrum. Recent public opinion polls generally report increasingly favorable attitudes toward labor unions. Similarly, previously indifferent academics have been creating Labor Academic Teach-Ins across the country (ten on October 3, 1996, alone), and over 1,500 collegians served labor's Cause in 1996's "Union Summer" AFL-CIO project. Best of all for labor, the media has been giving all of this considerable attention, some of it even positive. The resulting buzz underlines an influential notion abroad in the land -- labor is back! Three questions cut to the heart of the matter: First, how really different is the new AFL-CIO? Has the competition between the Kirkland and the Sweeney models of a labor federation really made a difference? Second, are the Sweeney initiated changes enough? Can they possibly secure labor's survival? And finally, what else might the AFL-CIO and its affiliates do to heighten their prospects? Is there an agenda of change related to the arrival of the Information Age that warrants greater-than-ever attention from, and adaptation by Organized Labor?

To briefly anticipate my answers, I believe differences between the old and new models of the AFL-CIO are quite substantial. However, they may not be enough to counter all that is arrayed against labor. Rapid employment is necessary of what I call the CyberUnion model, one already under development in the new AFL-CIO and a small number of especially progressive unions.

IS THERE A NEW AFL-CIO?

Examples abound of major changes from the ailing AFL-CIO model overseen for nearly two decades by Lane Kirkland, a protégé of George Meany. Like his mentor, Kirkland was a pragmatic, narrow, hard-boiled, unsentimental curmudgeon and Cold Warrior. His was a prosaic and hide-bound view of unionism, one rooted in an old-fashioned "control and command" model that intimated opponents, suppressed dissent, and assured only under-supported changes that invariably helped preserve the status quo.

Since October,1995, Kirkland's successor, former SEIU president John Sweeney, has championed a far more adventurous and far less elitist model. Still in its formative stage, it has its start-up share of gaps and inconsistencies. This not withstanding, the Sweeney "New Voices" coalition already sets the AFL-CIO far apart from its predecessor, as it has implemented differences (not the least of which was quickly "accepting" the early retirement, etc., of over 60 staffers) that appear to make a strategic difference.

Consider the following ten examples of change in the federation's practices and ethos, each of which has made a significant contribution to its reinvention, and thereby, to the renewal of the entire labor movement:

> 1. No longer do top leaders bask in the sun at every winters' annual meeting in Bal Harbor, Florida, as they have for the past 70 years. And no longer is this regarded as a perk only for the exercise of Byzantine Palace politics and Machiavellian career maneuvers.
>
> Instead, the annual winter meeting was ceremoniously moved this year to Los Angeles, the better to enable attendees to show up and

lend support at high-profile picket lines. It will continue to move around the country, even pitching its tent in gritty once-industrial cities like Detroit and Pittsburgh.

The Sweeney team believes this "down-and-dirty" location strategy should help boost local morale, as the top brass will deliberately get out and mingle with area activists who might otherwise not have such an opportunity. It should strengthen the impression that AFL-CIO leaders now mean to stay close both to members and to urban and industrial conflict realities alike.

2. No longer does the AFL-CIO Executive Council consist almost exclusively of old white men (with a token one or two women and persons of color carefully included to possibly dilute criticism).

This picture, mirroring as it did the hegemony of male, pale, stale, and stolid leaders, has fed anti-union propaganda for decades, and cost labor untold votes from women and non-whites in critical NLRB elections.

Now, a widely-expanded Council (54 members) includes Asian-Pacific Americans, Hispanics, and far more African Americans and women than ever before. As well, the Sweeney team itself includes the highest level female executive officer (Linda Chavez-Thompson) in the Federation's history.

3. No longer are AFL-CIO research staffers constrained to focus on narrow policy matters, on specific pieces of legislation pending or under way, thereby assuring only a reactive and defensive position from labor lobbyists or its few political allies. Under Kirkland the AFL-CIO had been reduced to fighting primarily for its own narrow sectional interests. Attention was often diverted thereby from larger social justice objectives that had animated labor's New Deal legislative agenda.

Instead, a new AFL-CIO Department for Public Policy operates far more like an imaginative think tank, one that has been encouraged to take a long-range proactive view of economic and social issues. Thoroughly revamped, it is expected to soon offer some "out-of-the-box" policy reform ideas, many possibly as populist and visionary as those with which labor was identified back in the New Deal era.

4. No longer will the Fed look the other way while high-priced consultants casually steer Taft-Hartley pension fund millions into the stocks of rabidly anti-union corporations.

Instead, the Fed is busy clarifying investment mechanisms whereby the"Green Power" represented by billions of pension dollars might finally be employed as a pro-labor weapon in economic matters. Firms that treat unions with respect will get union money invested in their stocks; others will not.

Firms that treat unions with respect can also expect labor to side with progressive company leaders on proxy vote issues. Others will face the combined opposition of labor and its new allies among massive socially-concerned funds (those of certain municipal governments, colleges, foundations, religious orders, churches, and socially-screened investment funds). This coalition continues to challenge narrow definitions of corporate profitability and responsibility, promoting instead a populist notion of stakeholder rights and responsibilities, e.g., opposition to offshore, relocation of jobs, arbitrary downsizing and plant closings, etc. Already one three year old multi-million dollar fund, Union Standard Trust invests only in its own list of over 400 firms that qualify as especially friendly-to-labor: To the political and financial satisfaction of its supporters, the UST regularly out-performs the Standard and Poor Index.

5. No longer does the AFL-CIO cite the autonomy of its affiliates in wanly excusing the very poor record of cooperation by unions with one another's struggles. No longer does it shrug with (feigned) helplessness when confronted by the fratricidal raids of certain of its unions on other of its unions.

Instead, the new Federation has begun to vigorously encourage- and help finance high-powered campaigns of inter-union mutual aid, this is an overdue boost to the ancient notion of "solidarity." AFL-CIO staffers are given longer time, more authority, better media coverage, and far more funds than previously true of such ventures. As well, it has begun to clarify vague matters of jurisdiction so as to discourage raids even while encouraging outreach to unorganized groups previously overlooked.

6. Similarly, in this matter of coalition-building, no longer does the AFL-CIO cite divisions in the ranks as an excuse for avoiding contact, better yet alliances with certain stigmatized groups of workers.

Instead, the new AFL-CIO, for example, works with the Gay and Lesbian Task Force on the basis of mutual respect, attention being paid in particular to achieving contractual language that adds "sexual orientation" to the list of protected classes in a contract's inclusion clause.

The AFL-CIO also collaborates with controversial community-organizing groups like ACORN. Together they are trying to secure the right to organize for more than one million former welfare recipients forced into the workforce. The AFL-CIO is campaigning to secure "Living Wage" legislation in key cities, and it demonstrates alongside of welfare recipients seeking justice and compassion in the enactment of experimental state welfare laws.

Consistent with this enlargement of the mission, the Federation's new Working Women's Department has launched a campaign to publicize "pocketbook" issues important to ALL women, whether dues payers or not -- this is an assertive variation of the Federation's attention-getting "America Needs a Raise" campaign.

7. No longer does the AFL-CIO cooperate with the CIA and other shadowy government groups in the promotion of anti-communist elements overseas, even when this means turning its back on indigenous labor groups at odds with right-wing dictators and iron fist authoritarians.

Instead, the new AFL-CIO is thoroughly revamping its overseas operations. It is severing ties with right-wing pseudo-labor organizations in developing nations, and it is opening cordial relations with pro-union indigenous activists who would probably not earn the approval of American Far Right ideologues.

8. No longer is the Fed's political action effort primarily a matter of conventional phone bank efforts and PAC donations, a combination better known for post-election excuses (and oblique condemnation of the unreliability of the rank-and-file) than for its ballot-box successes.

Instead, as the 1996 presidential election demonstrated, the new AFL-CIO brings flair, pizzas, and high energy to a creative effort: Its $35 million expenditure on catchy TV ads, house-to-house (campaigning, and centrist policies helped it capture media attention and the wrath of surprised conservatives who had erroneously written it off.

When the smoke cleared, Labor had helped defeat 18 targeted candidates for the House. It had helped protect Medicare and the Minimum Wage. And it turned two and a half million voters it had lost in 1994 back into labor's column. It showed the nations it was still quite alive, and it gave members an overdue sense of their power through the ballot. Little surprise, accordingly, that unions like AGSCME claim more members, gave voluntary donations, time, and effort than in any other previous election.

9. No longer do Federation affiliates (74 unions) comfortably operate in accord with the infamous "Rule of Five." That is, accept as unexceptional the practice whereby their organizing budget was held to no more than five percent of the union's financial (and human) resources.

A major explanation for the failure of many organizing campaigns, the Rule covertly assured incumbent officers that few newcomers would soon threaten the status quo (as in the case of their reelection chances). It belonged to a tired, burned-out model of unionism, one that barely served the needs of a declining number of gray-haired white males. Little wonder that labor declined a calamitous decline from 36 percent of the workforce in 1953 to only 14 percent at present.

In place of the fatalism and foreboding that characterized discussions of organizing in the pre-Sweeney years, new AFL-CIO influentials like Richard Trumpka, Linda Chavez-Thompson, and others, move effectively to repeal the Rule of Five. Where once top leaders seemed to lack the conviction that labor's numbers could soon increase, they barnstorm endlessly, arguing just the opposite -- and they offer concrete examples of organizing wins being earned (or at least vigorously sought) here, there, and elsewhere.

Created by six major unions in 1989, the innovative AFL-CIO Organizing Institute has had its size, funds, and staff vastly increased. Its successful 1996 "Union Summer" Project, one that rewarded labor with great PR and a sizable number of new young and energetic organizers, has earned a repeat effort in 1997. The difference this time involves creation of a small army of volunteer union retirees, many of whom will mentor college students and other young adults eager to test whether labor is their calling.

A small number of very large internationals (AFSCME, AFT, CWA, IBT, UFCW, UNITE, etc.), impressed with the organizing gains racked up recently by Sweeney's old union, the SEIU (as from the Justice for Janitors campaign, etc.), are making substantial increases in their own organizing outlay (funds, personnel, publicity, priority, etc.). To their credit, and fully in the spirit of the Sweeney emphasis on grass-roots involvement, they are also making considerable use of their own members as volunteer organizers, thereby aiding a related cause -- organizing the organized!

Progress has been elusive: For all of the razzle-dazzle of the new AFL-CIO these past two years, during the first six months of 1996 its 74 AFL-CIO affiliates participated in fewer elections, and lost more of them than in the same period in 1995 -- when Sweeney took charge. Indeed, Labor in 1996 gained *en toto* only 12,000 new members -- when 300,000 are thought necessary to just stand still as a percent of the labor force, and a million new member would be required to move labor from 14 percent up to 15 percent of all workers. ... gains that have not been approached for over 60 years.

Undaunted by these numbers, the Sweeney team insists the picture would be far worse but for the innovations and esprit they bring to the organizing challenge. To judge cautiously from a manifest pickup in media coverage of this organizing campaign and that one, often surprisingly sympathetic coverage, the AFL-CIO may finally be at the beginning of a winning streak.

10. No longer does the AFL-CIO have to limp along on a stringency budget, one that can serve plaintively as an excuse not to attempt this bold and expensive venture, or that one. Nor is it hostage as in the past to the withholding of critical per capita funds by a petulant union president irked by this or that action of the Executive Council.

Instead, the Federation can now leverage a new source of substantial revenue of its own -- revenue fees from an improved AFL-CIO credit card. Its 1996 arrangement with Household International, the Fed has been guaranteed that it will earn at least $75 million a year in royalties over the next five years. That will exceed by $10 million a year the amount the old AFL-CIO collected as dues from affiliates.

To be sure, critics inside and outside of labor condemn the credit card as a timid response that diverts attention from fundamental problems, and confuses the role of the Federation with that of the consumer culture. Proponents rebut that members appreciate the savings, prefer to see labor make something on their purchases, and welcome a painless opportunity to lend support.

Thanks to this windfall, the Sweeney administration is cautiously buying imaginative upgrades the Kirkland team might have dismissed as over-priced fills, e.g., the entire AFL-CIO building is being re-engineered for cutting-edge fiber optic telecommunication systems to better position the Labor Movement to prove a major player in the cyberspace world that beckons (more on this later).

This ten-item list could be extended quite a bit, as mention should be made of the new emphasis on revitalizing near-moribund city central bodies and state federations. The point, however, is already clear: The differences between the Sweeney model and its predecessor come close to being differences of kind rather than degree.

The Sweeney "New Voices" leadership team is animated by a vision of unionism quite distinct from that known to the Kirkland entourage. Sweeney and his colleagues have initiated a thorough overhaul and redirection of the AFL-CIO, a "velvet revolution" still quite young and far from complete (indeed, enthusiasts contend the AFL-CIO will deliberately model an open-ended on-going renewal process). They have positioned organized labor, or at least that aspect of it under their control, at the cutting-edge of democratic social change. Keenly aware labor is at a flex point in its history, theirs is an administration that does not fear to dare, and intends to make the most of its every opportunity.

IS IT ENOUGH?

My second question asks -- Is it enough? Can it provide enough of a shield, and protect enough time, for labor to end its slippage, and possibly even begin to increase its percent representation of the nation's workforce?

Possibly not, though not for any lack of trying on the part of the new AFL-CIO. The problem lies elsewhere, lies, that is in the limits that operate on a Federation whose affiliates commonly lag far behind it.

Not to put too fine a point on it, but the AFL-CIO can only be as strong as its major affiliates, and this dependency of the Federation could prove its Achilles' Heel. The merits and demerits of the 74 AFL-CIO unions will determine if there are any unions left tomorrow to affiliate with an AFL-CIO. Here is where the fate of Organized Labor may especially be decided -- and the picture is far less clear than is true of Sweeney's renewal of the Federation.

Where the major international unions are concerned, turmoil seems the order of the day. An impartial student of the 74 international unions on whom the AFL-CIO depends would have to conclude they leave much to be desired. Many are still dominated by the desire of officers not to have to "return to the tools," a desire which translates into the fiercest type of protective politics and defensive stratagems. Many have little or nothing to do with other unions, even those allied in the same industry. Many are far behind the curve where the employment of modern communication tools and approaches are concerned. Many wish for the "old shoe" comfort of years past, and find the hurly-burly of the fin-de-millennium damn near overwhelming.

Membership continues to decline as do dues revenues. Opposition to dues increases, as does disagreement about the course labor should take next. Leaders are being replaced faster than ever, locals are being consolidated more than ever, and mergers (like that of the UAW, the Machinists, and the Steelworkers) are in the wind. Uncertainty and impermanence characterize the lives of officers and staffers alike, with problematic morale the order of the day.

None of this encourages the kind of bold risk-taking that the AFL-CIO models, and this is the rub: Without such innovation by the international unions themselves, much of the potential gain of the Federation is undermined. Nostalgic for the somnambulistic Kirkland years, but intrigued by the razzle-dazzle appeal of the Sweeney model, many international unions appear ready for something, for almost anything, but they seem to know not what.

SOLVING FOR AN AGE OF INFORMATION

My third and final question asks -- What else might the AFL-CIO and its affiliates do to heighten their prospects? Is there an agenda of change related the arrival of the Information Age that warrants greater-than-ever attention from, and adaptation by Organized Labor?

With mind-boggling speed the so-called Age of Information has swept in and engulfed organized labor in a world surely not of its own making, but rife, nevertheless, with rich opportunities. Infotech, or the mix of gadgets spawned by a synthesis of computers and telecommunications, revolutionizes organizations and the lives of us all. Cellular phones abound. We wonder how we ever got anything done before e-mail. We take the fax for granted, and watch with wonder while the Internet transforms itself before our eyes. Our children ask how did we ever get along before search engines, personal homepages, Nintendo, Myst, interactive games, chat rooms, and the exotic like.

Much to its credit, the AFL-CIO and certain of its major affiliates have moved quickly to turn infotech to an advantage. The AFL-CIO's LaborNet Service on Compuserve, for example, has pioneered in bringing both official information and informal chat rooms to union activists. International homepages, and those of especially forward-looking locals can be found on the Internet, along with specialized list services, such as PubLabor, that enable unionists to engage in free-wheeling focused discussions (as, for example, of items of special interest to public sector unionists).

Equally impressive are such innovations as the use of the Hotel and Restaurant Union is making of a site on the Net to warn unionists away from hotels it is picketing. The Flight Attendants Union has created a Net site for collecting complaints from members about airplane equipment problems the union intends to soon address. Insurgents in the American Airline Pilots Union are using faxes and e-mail to rally their troops. And cyberprotesters around the world recently rallied to bombard Bridgestone-Firestone executives with e-mail protesting the company's treatment of its American workforce.

More and more, labor cannot hold its own in arbitrations unless its representative is using a laptop. It cannot match the other side of the bargaining table unless its representative is using a modular phone, a fax, and a laptop. It cannot bring back useful material from a discussion or conference unless conveyed via a modular phone or swiftly word-processed into a laptop. All of these forms of empowerment and more are operational today, but they appear true of only a very small portion of union professionals.

Labor's effort here falls far short of the potential, as it remains inchoate an directionless. Labor's various computer instructors, for example, are still not knit together in one organization, and do not even have their own list services. Various locals are busy re-inventing the wheel in infotech applications because their international does not have a central office to help field-proven tools gain employment. No cross-fertilization occurs, except sporadically when a good list service like PubLabor has a contributor highlight an infotech gain.

TRY THE CYBERUNION MODEL

The time is at hand for the AFL-CIO and particularly assertive affiliates to consider adoption of the CyberUnion model, an intriguing 21st century approach to trade unionism. Marked by enthusiasm for the Age of Information, it is creative in making the most of what other frustrated unions find daunting in the extreme.

A CyberUnion stands out in its employment of futuristics (a perspective), infotech (cutting-edge tool), and tradition (a commitment). Its appreciation for what "F-I-T" can do for it has enthusiasts believing the CyberUnion could enable labor to surge early in the next century.

Employing an art form known as futuristics, a CyberUnion will replace the narrow "putting-out-fires" orientation of most unions with a longer perspective, one that encompasses the here-and-now, but extends five and ten years beyond it. It will replace a narrow tolerance for shopworn communication tools (newsletters, mailings, etc.) with a high-tech perspective, one that upgrades familiar tools (as in adding color to the newsletter) even as it moves to the cutting-edge (e-mail for all; list services for many; etc.). Finally, it will replace hollow observances of union traditions with whole-hearted celebrations, the better to ensure that labor's high tech gains are always accompanied by comparable high tech advances, e.g., a local's history and traditions could be "captured" in a memorable CD-ROM provided to all.

INFOTECH EMPLOYMENT

Leaving further discussion of both futuristics and tradition for another time, a CyberUnion's employment of infotech might include at least five features:

1. It will employ infotech tools to regularly survey members, both actual and potential, to learn in depth what are their needs and wants, their dreams and nightmares.

2. It will employ infotech tools to keep members abreast of relevant developments, and, to learn of such from the rank-and-file. The union's

homepage is updated daily, and e-mail of real merit flows often back and forth between officers and the rank-and-file.

3. It will employ infotech tools to survey members and ascertain preferences and priorities among major questions confronting the organization. Every effort is made to improve member participation in union policy-making.

4. It will make all of its officers and staffers accessible to members via e-mail, and promises personal responses within 72 hours of a message's receipt.

5. It will update its infotech infrastructure regularly. It will take pride both in being at the cutting-edge, and, in making a special effort to take the membership there with it.

These five attributes should help put labor unions on a par with the CyberCorps rapidly coming their way. They should send the message that labor is finally "with it!," a message of import for the union's membership, the media, the public, and the business community. They should empower the rank-and-file as never before.

Unions uniquely blend humanistic, ethical, and materialistic concerns. They should be able to produce a distinctive set of infotech-use rewards, one that will have the citizenry sit up, notice, and applaud. They should be able to get Americans to think of unions, and not just of corporations, when they think about successful cutting-edge organizations. And they should mentor their membership in closing the gap between info-haves and have-nots, arguably the greatest threat posed now to democracy.

DOUBTS AND MISGIVINGS

Skeptics will dismiss futuristics as only for the secure; infotech, as only for an effete elite; and tradition, as only for those less busy than unionists with barely surviving, better yet celebrating anything. They will insist the vast majority of union members are outside the infotech loop, and that this CyberUnion prescription is therefore irrelevant.

In rebuttal, proponents can point out ever more unionized workers co-exist with infotech, and especially with computers, at work. Even if the average unionist's living room does not presently contain a PC, the work station probably does. As well, advances in inexpensive devices to access the Internet without a PC (webservers, etc.) promise to soon vastly expand the reach of the Net (to say nothing of speculation that a voice-activated/voice-responsive Palmtop, or very small computer won on the wrist, may be commonplace by 2005).

The point, in short, is really not that of hardware or access to it. Rather, the point is to rapidly and thoroughly link labor with all that a smart organization can draw out of infotech, and to "bookend" such adaptation with the ballast of tradition and the headiness of futuristics.

Contrary to the misgivings of detractors, adoption of a CyberUnion model is not an implausible or impractical proposal. It builds on initiatives the AFL-CIO and key unions have already begun to take. (The fact that the Sweeney team renamed the AFL-CIO News, their bland and unexceptional house organ, Americ@Work, and transformed it into a bright, brassy, and "hip" publication, is much to the point). This model could invigorate adapters, inspire the membership, favorably impress prospective members, intimidate labor's opponents, intrigue vote-seekers, and in other valuable ways, significantly bolster labor's chances.

GETTING THE AFL-CIO ON BOARD

Provided, that is, that the AFL-CIO rises to the occasion. It could create a new Office for CyberUnions@Work, one that could serve as the "R&D" center for the promotion of the CyberUnion model.

The Office could hire infotech experts, scrutinize the vast infotech literature (hardcopy as well as Net material), represent labor at major infotech conferences, and in 1,001 other ways, help assure that labor stays at the cutting-edge in its employment of infotech potential.

Similarly, the Office could scan the literature in futuristics, interview leading long-range forecasters, represent organized labor at meetings of futurists, and help unions and locals learn how to employ forecasting to advantage.

Where tradition is concerned, the Office could study the success of "Bread and Roses," the art and theater project of District 1199-C, and the Annual Labor Arts Festival at the Meany Center, along with similar sources of lessons for bringing the best of the past into the future.

With guidance from the Office, the AFL-CIO could devote an entire page in every issue of Americ@Work to CyberUnion innovations field-proven by a union affiliate and available now for adoption by others. It could highlight such advances at its various meetings, run competitions, and award prizes for outstanding projects. It could pioneer CyberUnion tactics, gadgets, and applications itself, taking care always to promote their employment by its affiliates.

The AFL-CIO could ask its educational unit, The George Meany Center for Labor Studies (which President Sweeney enjoys calling Labor's "War College") to create a degree-granting program in CyberUnion Studies. Graduates could be placed with international and large locals long ago convinced that they either secure infotech craft or fall hopelessly behind. Similarly, the AFL-CIO could encourage the

University and College Labor Educators Association to begin including CyberUnion material in labor ed programs from coast to coast.

Finally, in recognition of the global nature of this challenge, the new AFL-CIO Office of CyberUnions@Work could sponsor an Annual International Meeting of interested laborites from nations hither and yon. Daily contact among such influentials via teleconferences and e-mail should vastly increase the international exchange of ideas. Nevertheless, annual opportunities for hand-on demonstrations will probably long make a uniquely valuable contribution.

In short, mind-boggling advances in Information Age dynamics will undoubtedly sow much new confusion. Organized labor, thanks to its CyberUnion use of futuristics, infotech, and tradition (F-I-T), should have good utilization experiences to draw on, pride in accomplishment, and a heady sense of adventure about it all.

SUMMARY

Organized labor, for the first time in 35 years, is moving again, showing its "smarts," and feeling cautiously hopeful. If it is to keep up momentum, the AFL-CIO and its major affiliates must speed up their development of a 21st century CyberUnion model. Supporters are encouraged by evidence the Sweeney team and its union allies intend to make the most of futuristics, infotech, and tradition (F-I-T). If they have their way, America's new CyberUnions will show the world that unionism does "compute" in our Age of Information.

II. THE FUTURE OF TENURE

A. The Future of Tenure: Moving Beyond Polemics

B. Academic Tenure: Between All or Nothing

C. The Assault on Faculty Independence

D. A Case for the Renewal of Tenure

THE FUTURE OF TENURE

A. THE FUTURE OF TENURE: MOVING BEYOND POLEMICS

Henry Lee Allen
Assistant Professor of Education
University of Rochester

INTRODUCTION

Despite its resilience across decades and various types of colleges or universities, tenure has become a polemical issue in policy debates about the future of higher education in the United States. For those who see tenure as the ultimate symbol of academic freedom and professionalization, such polemics are indeed very distressing. These proponents recognize that the acquisition of tenure means that tenured faculty have been tempered by great travail as they have pursued their professional duties of teaching, research, administration, and public service. After all, key recent studies show that the financial and other rewards of the academic career pale in comparison to other educated professions (Bowen and Schuster 1986; Bok 1993). Moreover, higher education as an industry has moved drastically from the best of times for many academic disciplines in an era of borderline retrenchment in recent years.

For many decades, tenure has been regarded by aspiring faculty as the supreme institutional reward for years of deferred gratification, relative deprivation, and arduous study suffered while overcoming tremendous obstacles. This grueling odyssey begins in graduate school and ends more than a decade later only if the faculty member successfully passes his or her probationary tests as an assistant professor at his or her hiring institution. Untenured faculty lead precarious and stressful lives as they seek the right institutional employer where they can reach their professional horizons. Consequently, the stakes are high for all members of the academic professions as the future of tenure is debated.

Faculty members develop very complicated lives as they negotiate institutional and professional domains (Finnegan, Webster, and Gamson 1996). Most faculty have to proceed tenaciously for years through a tortuous gauntlet to achieve tenure, assuming they are able to survive the indelible hazards of the academic marketplace. Because these academic women and men pursue their vulnerable craft by acting against their immediate material interests (voluntarily subordinating extrinsic rewards to their intrinsic motivation to serve nonprofit educational institutions), tenure has traditionally been appreciated as the penultimate benefit of an academic career. For these weary but triumphant faculty, the possibility of losing tenure seems ridiculous -- apart from similar, yet coordinated, attempts to abolish seniority privileges within other industries or to eliminate the impact of incumbency upon political offices. Moreover, they reason that the case against tenure has not been proven satisfactorily by those detractors who rely on simplistic anecdotes and sensational aberrations to manipulate public animosities (Oakley 1991).

Critics of tenure vary, from those who seek minor modifications in its terms to those who lobby for its complete abolition. Altogether, they see tenure as antiquated sinecure in an unprecedented era of escalating cost pressures and budgetary cutbacks that are now affecting colleges and universities in lethal ways. Many tenure critics blame faculty unions for the institutionalization of tenure, mistaking their advocacy for arrogance. In essence, tenure is seen as the most fundamental obstacle to progress in refashioning faculty prerogatives according to their ideological dictates.

Meanwhile, other critics view the faculty autonomy that tenure status gives to professors as an impediment to restructuring higher education to be more cost effective. A vocal set of detractors even blames tenure for diffusing radical ideas among undergraduates; or worse yet, for failing to teach them as effectively as expected. In short, the case against tenure revolves around the specious assumption that faculty are not earning this unique professional status by appropriate deference, persistent labor, and productive efforts. Tenured professors are presumed to be guilty of abusing the public trust.

The ideas presented in this paper assume that the current debate over tenure is premature and misdirected, subject to the whims and caprices of truncated conjectures. Tenure is not an obstruction to the conduct of the academic enterprise; it may even be an asset especially since organizational turnover tends to destabilize an institution. My thesis is that the current tenure debate is a misnomer at best, given the paucity of evidence that tenure is malfunctioning. Hence, whether tenure needs to be redesigned or abolished is inconclusive. Rather, the most pivotal issue facing more than sixty-two percent of its full-time faculty with tenure. Fifthly, with the exception of faculty in home economics or agriculture, most academic areas failed to have more than half of their members with tenure. Finally, NSOPF-93 data do not show any egregious discrepancy in the total number of hours worked when tenured and nontenured faculty are compared. Unless one is willing to discount these issues, it is difficult to justify viewing tenure as the culprit responsible for the demise of American higher education. It seems that the critics of tenure have misplaced their analysis by using spurious conjectures instead of systematic data. Being a professor and being tenured are not synonymous.

Table 1

Computation by DAS-T Version 0.50 on 8/ 1/96						
Workload at institution by tenured status						
Source: NCES, National Survey of Postsecondary Faculty: 1993 4/1/96						
	Tenure status					
	Tenured	On tenure track but not tenured	Not on tenure track	No tenure system for my faculty status	No tenure system at institution	Average total hours per week worked
	(Mean[0])	(Mean[0])	(Mean[0])	(Mean[0])	(Mean[0])	Total
Estimates						
Total	52.2	53.34	39.67	36.16	43.89	45.75
Institution stratum, matches NSOPF88						
Public research	55.85	57.22	48.23	46.52	low n	53.67
Private research	56.67	59.33	47.7	43.81	low n	51.97
Public PhD/including m	55.08	55.38	45.23	41.25	low n	51.02
Private PhD/including	53.34	54.58	42.65	42.3	46.1	48.29
Public comprehensive	51.9	52.56	39.96	37.16	low n	47.37
Private comprehensive	50.9	51.3	37.73	37.56	49.07	44.59
Liberal arts	51.39	53.56	39.39	36.25	50.14	46
Public two-year	45.91	46.08	33.22	31.08	41.52	37.75
Other, excluding privat	49.28	48.82	35.5	39.55	46.03	44.29
Standard Errors						
Total	0.27	0.34	0.49	0.54	0.75	0.29
Institution stratum, matches NSOPF88						
Public research	0.66	0.76	1.1	1.65	low n	0.42
Private research	1.45	1.25	1.77	2.58	low n	0.91
Public PhD/including m	0.66	0.62	1.53	2.09	low n	0.84
Private PhD/including	0.97	1.78	2.34	2.5	3.84	1.37
Public comprehensive	0.44	0.65	0.92	1.68	low n	0.47
Private comprehensive	0.69	0.83	1.24	1.34	2.52	0.72
Liberal arts	0.69	1.06	1.58	1.32	1.65	0.78
Public two-year	0.5	0.94	0.83	0.75	0.98	0.42
Other, excluding privat	1.25	1.72	2.29	3.72	1.27	1.19
Sample sizes (Weighted n/1,000)						
Total	322.94	127.31	214.61	169.47	65.43	899.77
Institution stratum, matches NSOPF88						
Public research	80.93	24.39	28.56	14.47	low n	148.82
Private research	18.92	9.23	16.02	9.88	low n	55.91
Public PhD/including m	32.96	16.45	18.99	9.44	low n	78.07
Private PhD/including	13.08	8.57	10.85	8.77	2.93	44.2
Public comprehensive	63.65	24.93	30.11	19.06	low n	138.67

Dismissing tenure on the basis of flimsy evidence or conjectures seems pretentious at best. To prove the case for reforming or abolishing tenure as a policy, substantive evidence is needed. Detractors depend too much on inadequate conceptualization and measurement strategies, favoring anecdotal or sensational accounts of abuses. They are skillful at either pointing out the instructional costs associated with faculty salaries or overemphasizing the few institutions where academic administrators are in vehement conflict with tenured faculty. The weak arguments against tenure are based on idiosyncratic stories from isolated -- rather than typical -- situations which are limited in scope and subject to unknown biases. Critics of tenure appear to relish selective perceptions as well as the fallacy of attributing causation to correlated phenomena. Implausible arguments are far too common; yet, rarely are they challenged with the rigor they deserve.

Regardless of its origins, the polemical debate over the future of tenure has been driven more by ideological sentiments than substantive evidence. Indeed, the debate about the merits of tenure is in many ways a clash between public benefactors, faculty, and administrators over authority relations. Faculty merely wish to have the dominant authority over the processes and outcomes which are instrumental to their accountability. The ultimate issue to be decided by public policy is therefore: who will have ultimate authority over the composition and evaluation of faculty work activities at the nation's colleges and universities? This question is especially germane at public institutions where tax dollars are used to fund academic departments. Tenure is symbolic that faculty have achieved the social right to regulate the recruitment, probation, and permanent employment of professional colleagues within a particular academic institution (Jencks and Riesman 1977).

To resolve the tenure debate with due civility, a reliance on survey research is insufficient. Faculty must monitor observational studies made by independent investigators who are not funded by opposing interests or antagonistic agendas. Research must compare institutional types, controlling for pre-existing or inconspicuous biases. Studies must be contextual, targeting organizational conditions as well as normative structures. The aim is to determine whether multiple studies can yield similar evidence. The reforms insisted by tenure critics can be considered viable only if and when systematic, corroborating evidence is forthcoming over time. Current critics eschew this conventional standard.

THE PROBLEMS OF PRODUCTIVITY

Admittedly, tenure is an easy target for those who are concerned about the escalating costs of postsecondary education. Nonetheless, scientific reality is often counterintuitive to popular conceptualizations of a situation. Policymakers must avoid a "herd mentality" in analyzing the relevance of tenure as a practice in higher education. Unless one is able to decouple or designate the effects of tenure on faculty motivation and productivity, it would seem foolhardy to reform or abolish tenure now -- despite contemporary fiscal pressures. Before proactive policies can be successful, one must learn systematically about the effects of tenure upon academic institutions and their effects upon it under a range of conditions.

All industries are affected by cost fluctuations over time; cycles of growth and decline are inimical to all organizations. Colleges and universities are not immune from such ecological realities. In other industries, the increasing costs of producing a particular product, coupled with concerns about its future marketability, might trigger a serious concern about the dimensions of an organization's productivity as well as that of its various components. Hence, the most salient aspects of a business -- encompassing both its intraorganizational and interorganizational features -- would be scrutinized severely. Universities and colleges are -- for better or worse -- business organizations. Higher education is not immune from the painstaking task of enhancing its productivity. Yet, scholars to date know almost nothing about the optimal conditions conducive to faculty, administrative, and organizational productivity in academic organizations.

Before one can reform or abolish tenure beyond its most perfunctory aspects, we must explicate the effects of the intraorganizational and interorganizational conditions under which faculty work. Aggregated data alone are grossly inadequate to dissecting the organizational impact of tenure rates. Market pressures, demographic transitions, organizational conditions, and policy effects must be held constant as the impact of tenure is assessed. All of these phenomena are associated with the issue of productivity. Hence, the problems connected with tenure are a function of the structures and processes influencing faculty productivity. Critics of tenure have neglected this inconspicuous distinction between tenure status and productivity. To reiterate, the debate over tenure may be spurious as long as our knowledge about productivity is so poor.

Tenure must be differentiated from productivity concerns. Popular critics often assail tenure for being the institutional protector of faculty who: (1) do not teach well, (2) complete inconsequential, inept, or insufficient research, (3) are recalcitrant or defiant in demeanor, (4) or even "burnt out" as they fulfill their professional responsibilities. Where substantiated rigorously beyond refutation, these institutional maladies are more appropriately diagnosed as problems of productivity, not tenure! Instead of academic freedom, they involve the creation and execution of organizational policies that promote departmental accountability as well as faculty development. Tenure can never be a panacea for poor organizational conditions that inhibit faculty productivity.

Nonetheless, tenure can increase faculty productivity by allowing faculty the freedom to tackle and experiment with the complexity endemic to their work. Given a particular set of organizational conditions and time parameters, faculty productivity is a multidimensional domain involving an array of extremely complicated measures delineating cognitive, interpersonal, communicative, instructional, curricular, pedagogical, administrative, heuristic, compositional, and publishing competencies.

A matrix of strategic decisions about people, places, conditions, time, and resources is suggested.

Faculty face a never-ending struggle in improving their professional abilities within an age where the complications of knowledge, technology, and diversity have exploded on college and university campuses. Rather than bash tenure, the real task for critics is to find ways to enhance faculty performance and competencies in these areas. Few academic organizations have innovative polices for refreshing faculty as they mature, a prerequisite for effective organizational development (Heilman and Hernstein 1983; Bess 1989; Schmuck and Runkel 1994). The structural as well as social incentives for renewal are grossly inadequate in many academic departments and institutions. Faculty development and accountability efforts may be intermittent, even punitive, on some campuses. In short, a culture of experimentation and innovation -- so acute for advances in productivity -- may not be present at many colleges and universities. Consequently, it is easy to see how critics make tenure a visible scapegoat for these more intractable organizational woes. Poor organizational climates make tenure an empty reward for faculty.

Tenured faculty are invaluable to higher education whenever they receive enriching organizational supports or creative interventions which increase their job satisfaction. With these, tenured faculty can foster institutional stability and establish benchmarks for newer faculty. They can certify and monitor quality. Not only must career development programs be enhanced for tenured faculty who are advancing in the institutional careers, but wise administrators must also seek to maximize organizational productivity in more than a haphazard fashion. They might institutionalize divisional centers of productivity and innovation on campus. In addition, administrators could also develop and integrate a schedule of various incentives for research, teaching, service, and other professional opportunities -- to be activated strategically at each stage of an academic career. Cohesive, yet concerted, organizational policies would go a long way toward revitalizing faculty in an era of downsizing and budget reductions. As a substitute, bashing tenure is quite counterproductive.

THE PERILS OF PRESUMPTIVE POLICIES

A conventional rule of practice is that any set of policy reforms must be proportional to the problems they are designed to remedy. The vast majority of tenured professors work honorably in their profession and need not be penalized or stigmatized for the excesses of a foolish minority. To advocate tenure is not the same thing as making an excuse for those negligible faculty who maliciously abuse the unique privileges of their tenure. Longitudinal research is imperative to ascertaining the prevalence of such abuses. Such inquiry simply must be a prelude to major policy changes if policy disasters are to be avoided.

Critics of tenure must beware of the law of unintended consequences because policy recommendations can backfire in unanticipated ways. Tenure has evolved to fill an important niche in the ecology of academic organizations; no one knows or can predict a priori the effects of nullifying it. One need only recall the pervasive disillusionment affecting citizens by virtue of the failed social policies of the 1960s for evidence that sustained pilot studies of proposed tenure reforms are mandatory to their eventual success. Unless the abuses of tenure greatly exceed its extensive professional benefits, the case for reforming or abolishing tenure remains moot, even reductionistic.

Next, college and university administrators must be careful to avoid the blunders common to simplistic, hasty policy prescriptions. Collegiality and bureaucracy are intertwined so delicately in academic settings that tenured faculty can suffer when administrative mistakes are made (Bess 1989). On many campuses, tenure can actually imprison faculty long after administrators have exited mysteriously due to failed organizational policies or inept leadership. Abolishing tenure will not help remedy these cases. Moreover, for diligent faculty, the simple act of demanding accountability without ensuring commensurate organizational innovation and excellence is exasperating. Surprisingly, critics have little to say about how to promote excellence among those administrators who manage institutions along with tenured faculty.

Finally, the reality of loose-coupling within institutions of higher education casts immediate doubt on those reforms imposed on faculty by external pressures. The loose-coupling of colleges and universities means that decisions at one administrative or policy level of an organization do not automatically filter down to subordinates as mandated. As is well known among those who study the actual behavior of persons or groups in educational organizations, loose-coupling inhibits the implementation of centralized dictates for several reasons. First, faculty must embrace tenure reforms if these are to be fully institutionalized. They are more likely to accept reforms where the evidence justifying them is rigorous and irrefutable. Secondly, uniform policy pronouncements are seldom successful in complicated, multidimensional contexts. These policies typically underestimate the impact of hidden mechanisms which affect the social interaction instrumental to organizational changes. Thirdly, coercive policies are rarely optimal for professionals who work out of intrinsic motivations. Such policies contaminate collegiality, creating an adversarial atmosphere that stymies effective growth.

CONCLUSIONS

In this brief paper, I have argued that tenure is not the problem its critics presume it to be. Rather, a principal issue facing all faculty is how to enhance their professional productivity in academic organizations that haphazardly monitor organizational productivity within and across departments. Before substantial progress can be made in enriching tenured faculty, the components and processes of productivity within the most salient aspects of academic organizations must be discerned. Hence, critics must sharply differentiate between tenure as an institutionalized practice and the role performance of unproductive tenured faculty. Research is needed to resolve conclusively the tenure debate.

A variety of studies would improve our understanding of the role and impact of tenured faculty in various types of colleges and universities. We need a systematic basis for comparing the role performance of tenured faculty with their counterparts. First, observational studies of the productivity of tenured faculty must be forthcoming. These studies must probe the depth and breadth of the academic enterprise, acknowledging the interface between its qualitative and quantitative aspects. Secondly, empirical studies that control for recruitment, resource, and organizational biases among institutions are likewise necessary. These studies need to be augmented in order to capture the interpersonal dynamics of faculty life.

A third set of studies involves computer simulations of the organizational behavior of faculty, administrators, trustees, and other key campus actors. These simulations might explore the effects of policy decisions, manipulate the demographic traits of actors, and entertain a range of scenarios in order to monitor or estimate how changes affect particular institutions. With these tools, the impact of reforming or abolishing tenure for various categories of academic organizations might be approximated. Finally, the functions undergirding the structures and dynamics within academic organizations should receive attention in mathematical models. These models are a prelude to a scientific understanding of academic systems; they might also pinpoint areas of organizational development as well as the locus of future ecological transformations in higher education.

If tenure is not the culprit critics allege it to be, there needs to be a moratorium on polemics. Without massive research to support their assertions, critics must recognize that precipitous action against tenure is unwarranted, and probably dangerous. At best, critics must guard against overreacting with respect to tenure based on immediate stresses. There is a policy vacuum affecting higher education, along with a lack of vision about what the future holds. These deficiencies indicate that social priorities are in flux, the inevitable result of lackluster political leadership. Higher education is a function of social and political priorities.

The tenure debate illustrates the need for coordinated, proactive leadership encompassing the common interests of faculty. At the very least, thinking and research about tenure needs to more beyond shallow concerns to matters of productivity. Perhaps, a voluntary council of core leaders from professional organizations, faculty unions, the National Academy of Sciences, the National Science Foundation, and other prestigious agencies or benefactors might coordinate strategies to enhance faculty productivity for the twenty-first century. Indeed, it is quite conceivable that tenure provides faculty with the longevity and security necessary to maximize faculty, departmental, and organizational productivity within academic organizations.

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THE FUTURE OF TENURE

B. ACADEMIC TENURE: BETWEEN ALL OR NOTHING

Richard Chait, Professor
Harvard Graduate School of Education

I would like to start with seven somewhat diverse data points that lead inescapably to a single conclusion.

1. When presented with an opportunity to establish new campuses, public officials in Arizona, California, and Florida decided not to offer tenure as an employment option.

2. In focus groups with civic leaders, tenure was "the object of particularly caustic comments. Not a single leader gave unreserved support to tenure as a necessary mechanism for protecting academic freedom. Most consider tenure to be counterproductive and, in fact, symbolic of much of what they consider to be wrong with higher education" (Harvey and Immerwahr, 1995, p.12).

3. In a 1995-96 survey of 34,000 full-time college and university faculty, 35% of all respondents, 43% under age 45, and 46% of all women agreed that "tenure is an outmoded concept," (Sax, Astin, Arredondo, and Korn, 1996, pp. 41, 93). Faculty of color were especially "skeptical of tenure" (Abilene (Texas) Reporter News, March 30, 1997.

4. The percentage of part-time faculty has doubled in just two decades, (Schuster, cited in U.S. News & World Report, March 3, 1997, p. 62).

5. Non-tenure track, full-time positions increased 42% over the past ten years (NEA Update, Vol. 1, No. 3, 1995). Of 161,000 current full-time faculty with seven or fewer years experience, one-third are on a non-tenure track (Finkelstein, Seal, and Schuster, forthcoming).

6. In 1989, only three of 46 AAU institutions had a formal post-tenure review process, but seven years later, 28 states had post-tenure policies in the discussion or

implementation stage, and 415 of 680 institutions surveyed had installed post-tenure reviews (LiCata and Morreale, 1996, pp. 2-3).

7. The proportion of universities with probationary periods that exceed seven years increased between 1974 and 1992 from 2.2% to 10% of public universities, and from 9% to 30% of private universities (El-Khawas and Furniss, 1974; Kirshstein, Matheson, Jing, and Zimbler, 1996, p. 23).

So where do these seven data points converge? As evidence that tenure's status, as both principle and practice, has eroded considerably. In the face of these facts, it is difficult to conclude that the arguments to preserve traditional tenure intact have been persuasive. David Breneman, of the University of Virginia, has remarked that the discussion of tenure has "an unreal flavor, because while spirited arguments fly back and forth at the level of high principle, the world to which these principles presumably apply is changing quietly and without fanfare toward a system marked by substantial diversity in employment arrangements (Breneman, 1997, p. 11)."

To be a bit more blunt, I am afraid that tenure's most ardent defenders are singing in the shower, where the music always sounds better than it really is. To the public ear and to the ear of many academics, the chorus of support for tenure seems increasingly off-key. Even as proponents proclaim tenure to be "a social good," and a "social benefit" (University of Illinois, 1996, p. 2, p. 43), large segments of society and the academy feel that it is neither so good nor so beneficial. Where are we left and what are we to say, if the public, via its representatives or via a referendum, decides that tenure should be ended at state colleges and universities? Recall Proposition 209 in California which nullified affirmative action, another policy most academics regarded as a "social good."

Much of the skepticism and antagonism toward tenure derives from the discrepancies between the lyrics and the realities.

- The lyrics state that tenure protects the academic freedom of faculty, otherwise doomed to "live in perpetual fear" of administrative and trustee "fiats" (University of Illinois, 1996, p. 12). Yet, several recent studies note that fellow faculty pose a far greater threat to academic freedom as junior faculty "conform to the prejudices of the senior faculty responsible for peer reviews" (Trower, 1996, p. 40; Tierney and Bensimon, 1996, p. 27, 140). Just last week, Richard Lyman, a president emeritus of Stanford, wrote that "...threats to academic freedom today come less often from Neanderthal administrators and trustees than from those members of the tenured departmental faculty who are such zealous promoters of particular schools of thought ... that they are prepared to grant tenure only to acolytes willing to adhere to their own views" (Chronicle of Higher Education, April 11, 1997, p. B 13).

- The lyrics state that tenure "is an instrument of quality control," (University of Illinois, 1996, p.8) awarded only after the most rigorous evaluations. Nonetheless, 3 of every 4 candidates were successful in 1992-93, admittedly a drop of five percentage points from 1988. However, campuses where 75% or more of the full-time faculty hold tenure are commonplace.

- The lyrics state that tenure does not insulate incompetent faculty from termination. To quote an AFT/NEA brochure titled "The Truth About Tenure in Higher Education," "A finding of incompetence or unprofessional conduct can still result in firing" (AFT/NEA, undated). In reality, data indicate that at four-year institutions only one quarter of one percent (55 of 220,000) were "removed for cause" in 1987, the most recent data I have seen (Russell, Cox, Williamson, Porter, 1990, p. 19).

- The lyrics state that tenured faculty may be dismissed due to financial exigency. In 1987, 112 tenured faculty (or .04%) were retrenched nationwide, none at four-year public campuses (Russell et al., p.19). In 1992, about two-tenths of one percent (689 of 354,232) of tenured, tenure track, and clinical and research faculty, were "downsized" at four-year institutions (Kirshstein et al., 1993, p. 15).

- The lyrics state that faculty can be removed due to program discontinuation. No one has expressed this policy more articulately than Professor William Van Alstyne, who states:

> H)ow utterly false is the claim that tenure would rather suffer hardship to an entire institution than hardship to any of its tenured staff....(T)enure provides no guarantee against becoming a casualty to institutional change (Quoted in Finkin, 1996, p. 5).

If only that were true, much of the unease about tenure among the University of Minnesota Regents would have evaporated. There, regulations bar the dismissal of any tenured faculty member at any time due to program discontinuation. Were the Dental School to close, all tenured faculty would have to be placed elsewhere in the University.

The Regents preferred a policy that would have permitted the termination of tenured faculty, after a good faith effort to reassign or retrain, whenever programs were discontinued or restructured. The addition of the latter term certainly inflamed matters, but the faculty leadership vociferously objected to any infringement on the guarantee to retain all tenured faculty in departments targeted for discontinuation.

- And, finally, the lyrics suggest that post-tenure reviews could lead to the removal of substandard faculty. Yet, most faculty allow that post-tenure reviews will not and should not generate pink slips, the public yardstick of effective internal quality control. At the University of Hawaii Manoa campus not one of some 600 reviews over six years triggered a dismissal (Goodman, 1994).

Taken together, these discrepancies between policy and practice, leave regents, legislators, citizens, and a large fraction of faculty and administrators disillusioned with tenure. We can, I suppose, dwell on the assignment of blame -- and no parties are blameless -- or we can adhere rigidly to principle, rather like the Vatican's stance on contraception or, more profitably, we can acknowledge that sea changes in context and conditions require new policies and practices.

We need to sing new tunes, with new words. We need to explore the vast expanse between tenure everywhere and tenure nowhere. To quote Adam Yarmolinsky (p. 1, 1997), Regents Professor at the University of Maryland:

> The question...is not whether to preserve...or abandon (tenure), but rather how we can adapt tenure to the changed and changing circumstances of the academic world....(T)enure is not going to go away....But tenure isn't going to stay the way it is either. The forces of change impinging on the academy will see to that.

Of a similar view, the New Pathways Project has advanced numerous propositions for discussion. I would like to highlight four.

1. Revamp the pre-tenure process. Junior faculty repeatedly report a mismatch between actual tenure criteria and espoused institutional missions. In response, Ohio State University now requires that every academic department develop a strategic plan, and then establish promotion and tenure criteria and conduct faculty evaluations consistent with that plan. In North Dakota, tenure decisions must take account of the faculty member's plans and institutional needs. These constructive measures should reduce the inconsistencies and randomness junior faculty regularly ascribe to the tenure process. Other helpful steps might include: restructured reward systems and better documentation to elevate the importance of teaching and public service, competency-based tenure agreements (Yarmolinsky, 1997), and a committee with a largely fixed membership to oversee and evaluate the work of a faculty member throughout the probationary period.

2. Revise the Standards for Dismissal Due to Program Discontinuation and Financial Exigency. "Why Do Universities Keep Everything?" asked rhetorically Donald Kennedy, another president emeritus of Stanford. "There are many reasons," including tenure and academic politics, Kennedy answered, why "in universities sunset is an hour that almost never arrives" and, therefore, it is "difficult for the university to take new directions nimbly" (Kennedy, 1993, pp. 97-98).

The AAUP's standards to dismiss tenured faculty for program discontinuation are deliberately stringent. Moreover, the abolishment of entire departments can often be an excessive and ill-advised action. However, standard policies do not allow the strategic elimination or reallocation of some tenured positions within a program or department.

Selective reductions raise the spectre of incursions on academic freedom. This menace could be circumvented if the administration, after faculty consultation, only had authority to: (a) establish broad areas for reductions, such as arts and humanities or medicine; and (b) stipulate the magnitude of the cuts. A faculty-only committee would specify the positions.

The impediment to such an approach is not policy as much as academic culture and custom. As Kennedy noted, "University faculties have unwritten understandings, and one of them is that they usually criticize one another's disciplines only in private....and in nearly every case the recommended deletion (is) a discipline far from the domain of the recommenders (p. 95)."

The threshold for financial exigency also presents an extreme challenge. What other organization awaits an imminent, acute, and comprehensive financial crisis before layoffs of long-time personnel begin?

We proposed (Chabotar and Honan, 1996) that institutions develop concrete, operative definitions to justify the dismissal of tenured faculty. We suggested that financial emergencies for private colleges be defined "as the existence of two or more of the following conditions: (1) a downgrade of the institution's bond rating to minimum investment grade...in a given year; (2) an operating budget deficit equivalent to 3 percent or more and that is greater than last year's; (3) three or more years of decline in FTE enrollment; and (4) real decline in the market value of the endowment, adjusted for inflation, for three or more years" (p. 29).

Much of the antipathy toward tenure among regents and elected officials could be alleviated by somewhat more flexible policies -- that admittedly allow layoffs of tenured faculty -- in order to enhance an institution's quality, attractiveness, and financial stability. If we continue to insist on impractically ironclad protections against terminations for program discontinuation or financial exigency, the attacks on tenure will escalate, probably commensurate with the deterioration of an institution's competitive position. As faculty, we need to ask whether a controlled burn is not preferable to a conflagration.

3. Create Incentives for Faculty to Forgo or Relinquish Tenure. In order to facilitate quality control, faculty would first stand for tenure as usual. After a favorable decision, faculty members would be free to choose lifetime employment or a multi-year contract, say ten years, that included a wage premium, accelerated sabbaticals, or comparable benefits, in exchange for any future claim to tenure. This system has operated at Webster University for more than twenty years where 88

percent of the faculty have opted for the non-tenure track. Why is this arrangement objectionable?

To induce faculty to waive or relinquish tenure, universities would signal a willingness to make the trade with the premium subject to case-by-case negotiations, just as some institutions now handle early retirement. Whatever the specifics, the basic notion seems plausible: correlate risk with reward, and allow faculty to choose a comfortable ratio. I disagree with the University of Illinois report which asserts that "Tenure is not the faculty member's to renounce. No one has the right to take a unilateral step that could weaken the protection for all." I favor the extension of academic freedom to encompass the right to decline tenure.

4. Decouple Academic Freedom and Academic Tenure. The dogma of the academy maintains that academic tenure and academic freedom are inseparable, that only the former can ensure the latter. Since most faculty are untenured today, the question might be how, not whether, to safeguard academic freedom.

Professor Peter Byrne of the Georgetown Law Center (1997) outlined a procedure that would offer faculty a contractually enforceable right to academic freedom. The key elements included: a peer-dominated internal review panel, an initial burden of proof on the faculty member to make a prima facie case whereupon the burden shifts to the institution, an oral hearing, and the possibility of further arbitration of still disputed claims by an external panel of peers.

Academic freedom without academic tenure is not simply a legal theory. At Hampshire College, academic freedom cases are presented first to an internal committee of four elected faculty and one elected student, and these decisions may be appealed to a panel of three Hampshire and two external colleagues. True, faculty bear the initial burden of proof, just as I understand faculty do on allegations of race, sex, or age discrimination, surely charges of equal magnitude to alleged violations of academic freedom. We have invited several lawyers and law professors to review draft language designed to ensure academic freedom for all faculty, tenured and untenured, part-time and full-time. Maybe that goal cannot be realized everywhere, but why not try? To the degree that institutions do uncouple academic freedom and employment security, the basic purposes of academic freedom will probably be far more understandable and palatable to the public.

CONCLUSION

To conclude, I do not wish to suggest now, nor have I ever suggested, that tenure be abolished categorically. Nor have I ever advised the trustees of a particular institution to end the practice.

I favor modifications and alternatives that take account of institutional circumstances, non-academic markets within the professions, and the needs and desires of faculty at various career stages. I see utility to variation and drawbacks to uniformity.

Significant changes at the most selective and affluent institutions may not be warranted unless and until stakeholders direct substantial resources elsewhere, or unless and until the faculty sees an advantage to multiple career paths and employment arrangements. In contrast, at state institutions, where tenure presents huge problems of public policy, public funds, and public relations, and at tuition-dependent institutions, where tenure can pose significant financial and programmatic challenges, and at academic medical centers nearly capsized by the waves of change in the health care industry, modifications may be necessary and options may be advisable.

I am not convinced that steadfast allegiance to the status quo serves the academy well. The counsel of Robert O'Neil, a distinguished champion of tenure and the AAUP, as well as a princely colleague, should be heeded.

> I am sometimes tempted to draw a line in the sand on issues like post-tenure review, repeated studies of the tenure system, and experimentation with non-tenure track alternatives. A moment of reflection brings me to quite a different view. We would... have done far better had we embraced such efforts at the start, and we probably could have been more effective in shaping them to our liking...(W)ould we not better serve the ultimate cause of faculty autonomy and accountability by signing on early, and thus becoming part of the solution rather than being perceived as intractable parts of the problem? Though I realize that such a view may be heretical in some quarters...I do offer it for collegial consideration....(W)e should maintain a completely open mind. We should welcome not only studies...but also the proposal and creation of basic and drastic alternatives. My personal view is that tenure is the worst of personnel systems save for all the others" (O'Neil, 1996, pp. 9-10).

To which I would add only, yes, but perhaps not the best system for every college, or every school within every university, or every professor for all seasons, under a uniform national code.

While we wage a sometimes regrettably acerbic war of words within the academy, tenure steadily cedes territory to potent external political and economic forces. Good theater is not always good strategy. Even legions of Johnny-one-notes singing tenure's praises cannot soothe the widespread qualms about traditional tenure.

"My argument about tenure," writes Yarmolinsky, "boils down to this -- the best way to preserve a valuable institution is to change it -- to make (tenure) a contract (not a status) that can be adapted to the changing needs of the institution and the scholar" (1997, p. 7). The profession needs more innovation and greater freedom to adopt arrangements appropriate to local conditions. This is, in fact, precisely how America has built an enviable and diverse system of higher education.

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THE FUTURE OF TENURE

C. THE ASSAULT ON FACULTY INDEPENDENCE

Matthew W. Finkin
Albert J. Harno Professor of Law
The University of Illinois

In 1915, a committee of distinguished academics issued a Manifesto for academic freedom and tenure. It rested the claim to tenure not only on the need to protect the freedom to teach, to disseminate and discuss the fruits of academic research, and the need to assure sufficient security to attract people of academic gift and independent mind, but also on the need to define the status of the faculty. "A university," the report opined, "is a great and indispensable organ of the higher life of a civilized community, in the work of which the trustees hold an essential and highly honorable place, but in which the faculties hold an *independent* place, with quite equal responsibilities -- and in relation to purely scientific and educational questions, the primary responsibility."[1]

The claim was not kindly received. Regental and administrative authority pointed to the fundamental principle of subordination, embedded in the employment relationship, measured against which the profession's claim was presumptuous. "No way has yet been found, " the Association of American Colleges rejoined in 1917, "to play the cello or the harp and at the same time to direct the orchestra."[2] It went on: "Official relationships form the circle within which individual initiative must find room for play, and sufficient academic freedom would seem to be granted when there is no interference *within the circle first prescribed* of research, thought and utterance."[3] It left no doubt where the power so to prescribe lay.

In 1915, the Board of Regents of the University of Utah defended its summary dismissal of two faculty members, for their criticism of the University administration, thusly:

> Dr. Knowlton [one of those dismissed]...has seen fit to speak very disrespectfully, if not insultingly, of the Chairman of the Board of Regents. From his standpoint, this doubtless means that he has exercised his inalienable rights of free thought, free speech and free action. But the President and the Board also have an equal right to free thought, free speech and free action, with the result that the President

> and the Board do not agree with Dr. Knowlton's sentiments; he may thereafter find an institution and State where similar sentiments against the presiding officer of the governing board may be approved. If so, that is where he belongs.[4]

So, too, did the *New York Times* editorialize in wake of the dismissal of Scott Nearing by the Wharton School in 1914 to assert the prerogatives of trustees: Let the upholders of "academic freedom,"

> establish a university of their own. Let them provide the funds, erect the buildings, lay out the campus, and then make a requisition on the padded cells of Bedlam for their teaching staff. Nobody would interfere with the full freedom of the professor, they could teach Socialism and shiftlessness until Doomsday without restraint. For one thing, that would give crank professors a congenial occupation and free universities established for other purposes from pressure to give employment to the teachers of raw and false doctrines.[5]

J. Levering Jones, a trustee of the University of Pennsylvania, defended the University even more bluntly: "No one has the right to question us."[6]

Suffice it to say, the dispute about academic freedom and tenure was seen by the academic profession, correctly, as a confrontation over the status of the faculty within the institution. In the ensuing debate, the very terms of mastery and service used to justify regental control took on a pejorative meaning at the hands of Progressive reformers: the professor was not to be made a "hireling,"[7] a "servant,"[8] a "mere employee,"[9] a "hired-man,"[10] a "placeholder"[11] (John Dewey's phrase), or a "subservient coward."[12]

By 1940, the academic profession and the Association of American Colleges had come to agreement that acceded (though not entirely) to the profession's view. The resulting joint AAUP-AAC 1940 *Statement of Principles on Academic Freedom and Tenure* was at pains to define the faculty member as an "officer" of the employing institution, and for obvious reasons. In private employment at the time, most jobs were held "at will." In private employment at the time, the common law implied an obligation of respectful subservience to higher authority. But the 1940 *Statement* not only recognized the need for tenure, it grounded that need as an essential buttress for a freedom to dissent from authority, even to criticize one's employer. Resonating against both the employment law and practice of the time, the 1940 *Statement* was, and is, a remarkable achievement in the annals of freedom.

In recent months, however, a massive assault on tenure has been mounted in the opinion pages of the popular[13] and trade press[14] -- a veritable mugging. Some of these have been cast as calls for reasoned reappraisal. We have been summoned by C. Peter Magrath to an "open debate," and by Richard Chait to "civilized discourse and incisive analysis." But, on closer inspection, little of what they offer is open-minded or analytically incisive, let alone civilized. Instead we have been presented with a series of tendentious propositions packaged with all the slickness of a political campaign.

This is a harsh accusation. I intend to prove it. Having done that, I will offer a suggestion at the close about what the current assault on tenure is all about.

To the first task at hand, analysis best proceeds from the half dozen or so rhetorical techniques the adversaries of tenure deploy: (1) The Big Lie; (2) The Red Herring; (3) The Invidious Comparison; (4) The Band Wagon; (5) The Glittering Generality; (6) The Trojan Horse; and, (7) The Half Truth. Let us take them in turn.

THE BIG LIE

Magrath has opined: "We must acknowledge that academic freedom and tenure, in fact, have been uncoupled." The assertion rests upon the fact that all persons enjoy the speech protections of the United States Constitution, whether an untenured instructor or the holder of an endowed chair, as indeed they do -- if they are employed in a public institution. Necessarily, then, Magrath conflates academic freedom and constitutional free speech. The two are not coextensive, as has been pointed out repeatedly before.[15] The proposition is wrong. Why, then, the willful repetition of it?

Interestingly, Magrath (and Chait) advert to an essay, a kind of "thought experiment" by Peter Byrne of the Georgetown Law School, to show how academic freedom can be protected without tenure. If academic freedom equals constitutional free speech, and if constitutional free speech adequately protects us all, why do we need to consider any such alternative?

I will turn to Byrne's essay later. Suffice it to say at this point the proposition that existing law (or some other alternative) can protect free speech in a tenureless academy assumes that it is desirable to separate out a special claim of wrongfully *motivated* discharge from claims merely of *wrongful* discharge. The former would be subject to adjudication; the latter would not. In this way, abridgments of academic freedom would be deterred even as administrations would remain otherwise free to dismiss. Consequently, the proponents of the proposition have to explain why a discharge that is wrongful not because it sanctions disciplinary speech, but because it is erroneous, arbitrary, or vindictive should *not* be heard. But neither Magrath nor Chait undertake that explanation.

Even in its own terms, the proposed distinction fails to recognize that, "The motive for a dismissal, and the reason officially given for it, are frequently two very different things."[16] This from Arthur Lovejoy's response to a similar proposal made in 1916. (Or, as Edward Kirkland put it two decades later, "Departure from consecrated conformity is a common prelude to the discovery that an intellectual non-conformant is in fact non-cooperative in other matters as well.")[17] The tenureless approach trusts the adjudicative body to sort it all out later on. But the prospect of that occurring, perhaps long after a discharge, is scarcely equivalent to a hearing on the *bona fides* of the discharge before it takes place. And lacking *that* protection, we can justifiably be skeptical that faculty would not tend to steer clear of any zone of speech or activity that would enmesh them in that very process. As Lovejoy noted, the attempt to protect only disciplinary discourse is "to give up all practical possibility of maintaining academic freedom."[18]

The intimate connection between tenure and academic freedom has been challenged not only by Magrath's repetition of a false proposition of law but, on other grounds, by Richard Chait. He claims that about half of all faculty members do not have tenure, which he takes in turn to call "into question the unbreakable bond between academic freedom and tenure." The proposition rests upon a nonsequitur of undergraduate dimension, as I will next explain; but the conclusion offered of it, that there is no bond whatsoever between academic freedom and tenure, is risible.

THE RED HERRING

The use and the potential misuse of adjunct and full-time but non-tenure eligible positions is a real issue, not the least of which concerns the lack of the kind of intensive evaluation that is a key feature of the award of tenure and which is wanting in the indefinite renewal of these positions. A real issue; but, a side issue, for it says nothing about the bond between academic freedom and tenure. The economist, Fritz Machlup, wrote that "if tenure is to serve freedom, it is...essential to make [tenure rules] cover as large a portion of the faculty as is possible *without jeopardizing other equally important objectives.*[19] Institutions require a period of probation. Some short term, visiting and other kinds of special appointments may be justified by programmatic need or for institutional flexibility. It may well be that institutions have gone much too far in the use of contingent academic staff. But it simply does not follow that because too many non-tenure track appointments have been made, then tenure no longer serves the ends conceived for it.

Machlup argued that a body of tenured faculty is essential if they are to speak freely to the administration and to rise to the defense of colleagues (or students or others) threatened by an arbitrary or dictatorial action. The question posed by Machlup is how many is "enough." In his opinion, as many as the system can accommodate consistent with other desirable institutional ends. Does the fact that not everyone is or can be tenured mean that no one should be? By this manner of reasoning, the 1915 *Declaration* should have been dead on arrival: How could any professor claim the need for tenure when, at the time, no professor had it? I am reminded of then Professor Frankfurter's argument for Oregon's ten hour day law before a Supreme Court still in the thrall of *Lochner*. "Ten hours! Ten! Why not four?" sneered Justice McReynolds. "Your Honor," Frankfurter replied, "if your physician should find that you're eating too much meat, it isn't necessary for him to urge you to become a vegetarian." Upon which from the bench, Justice Holmes said, "Good for you!"[20]

THE INVIDIOUS COMPARISON

Magrath also points to the fact that "people outside the academy, people whose jobs are in jeopardy, resent faculty members whose jobs carry special protection" as an argument against tenure. Most jobs in the private sector in 1915 were held at-will. Most jobs in the private sector in 1940 were held at-will. Most jobs in the private sector today are held at-will. This says nothing at all to what system is sensible for college and university faculty.

Let me point out that under the at-will rule an employee in the private sector can be discharged summarily for any reason or no reason, even a morally repugnant reason, so long as no law is infringed. In recent years, the judiciary has found nothing amiss in the discharge of an employee for having been a victim of rape,[21] for having consulted a lawyer about his workplace problems,[22] for wearing long hair,[23] for socializing with a former co-worker,[24] for having been thought (erroneously) to be dating a co-worker,[25] for refusing (as a newspaper editor) to wear an anti-union button,[26] for being a person who is "sympathetic to African-Americans,"[27] and, of course, for speaking disrespectfully of the enterprise's management in a private conversation[28] -- precisely the conduct that resulted in professor Knowlton's discharge in 1915. Must we now yield our claim to independence from authority because "people outside the academy" have less? But if the comparison is invidious on this account, would it not be equally invidious on the account of tenure?

Interestingly, one argument for tenure adverts to the political difficulty trustees and presidents have in defending the free speech rights of embattled faculty, over whom they had the power of summary dismissal, in the face of substantial hostility from outside the academy. It is much easier to say that a hearing must first be afforded because of tenure than to defend the speaker's right to utter the particularly offending words. If we are now called by chief executives to abandon tenure because of public displeasure in the abstract, how secure can we be that these same chief executives will display courage under hostile fire when directed at a visible target? The preemptive capitulation urged upon us here cannot be encouraging. Magrath assures us that the courts will save the speaker -- later on. But if tenure insures against the risk of administrative cowardice, Magrath's proposition invites it.

THE BAND WAGON

"According to Richard Chait...about 20 percent of all independent four-year colleges *no longer* offer their faculty lifetime contracts."[29] According to Cathy Trower, thirteen of 280 institutions replying to an AAHE survey "reported replacing [their] tenure systems."[30] That is, about 5 percent. A comparison conducted by Jonathan Knight of the Annual Reports of the Economic Status of the Profession surveying over 2,200 institutions, including about 690 baccalaureate colleges (public and private), concluded that of 89 colleges participating in 1995-96 and reporting no faculty with tenure -- a figure roughly congruent with the AAHE's survey that about

15 percent of their sample did not provide for tenure -- 39 had participated a decade earlier of these 32 then reported that no faculty had tenure[31] ie., as many as 7 of these schools had abandoned tenure.

In other words, about 13 percent to 15 percent of baccalaureate institutions reporting in two surveys have never offered tenure -- in both cases, most of these being Bible Colleges, schools of art and design, and very small church related colleges. And, over the past decade, tenure has been abandoned by as few as 1 percent or as many as 5 percent of this universe of institutions, depending on sample size. Scarcely the bandwagon Chait claims, even without considering the fact that some institutions have adopted tenure systems in this period.

THE GLITTERING GENERALITY

Of the 1940 *Statement*, Chait says, "[O]ne size no longer fits all." Institutions need "more alternatives to better serve individual faculty members and thereby strengthen departments and institutions."

> In a profession that prizes autonomy, we should not bar professors and universities from creating new, yet mutually beneficial, terms of employment that match individual interests and campus needs. In other words, let Bennington be Bennington.

All this sounds terrific. Who can be against any of it? But what does it mean? Legally, the choices an institution has as to security of employment are four: (1) at-will employment, in which the employee may be discharged at any moment for no reason; (2) employment for a fixed duration, though terminable for cause during its term; (3) permanent employment which continues indefinitely but is subject to termination upon express or implied conditions; and, (4) lifetime employment, which is a guarantee of a job irrespective of any future condition, i.e. a sinecure.

Though academic tenure is often spoken of as a "lifetime" job, it actually falls into the third category: After completion of a probationary period, a faculty member cannot be dismissed except for adequate cause or other valid condition such as financial exigency or the *bona fide* abolition of a department of instruction. That is the "one size that fits all." How does it not? Where is the lack of fit with the ends it is designed to serve? Chait never tells us. He cites only to the growth in the number of institutions of higher education since 1940 and concludes that we need "more alternatives." He is totally agnostic about what the terms of those alternatives might be, for if they are agreed to they could not be other than of "mutual benefit."

If so, why consider at-will and term employment? Why not voluntary servitude? If "new, yet mutually beneficial, terms of employment that match individual interests and campus needs" are called for, why would we not want at least to consider that as contributing to an enlarged menu of choice? Here, for example, is an employment contract used in South Carolina about the time the academic profession was coming to demand tenure:

> I agree at all times to be subject to the orders and command of said ----- or his agents, and perform all work required of me. ---- or his agents shall have the right to use such force as he or his agents may deem necessary to compel me to remain on his farm and to perform good and satisfactory services. He shall have the right lock me up for safekeeping, work me under the rules and regulations of his farm, and if I should leave his farm or run away he shall have the right of offer....a reward... for my capture and return..."[32]

Chait cannot scoff at this alternative because his very agnosticism on the content of the terms agreed to, so long as they are "mutually beneficial," is empty of any ethical content. This contractual option is not available, however, not because it may not be "mutually beneficial"-- in fact the laborers employed under these terms pronounced themselves "satisfied and contented" with them[33] -- but because we have decided it is inimical to the kind of society we wish to inhabit. The analogous question is not what agreements may be "mutually beneficial," but what system of employment best conduces toward the kind of institution of higher learning we wish to inhabit.

A TROJAN HORSE

Chait does come up with one concrete proposal. He has suggested that institutions should offer to buy out the claim to tenure in return for a higher salary or some other benefit. As he explains,

> If significant numbers of colleagues followed suit, the public might finally understand the value that the profession truly attaches to academic freedom as a fundamental principle, rather than as a convenient rationale for near-absolute employment security.

The "truly" gives pause. The Minneapolis College of Art and Design recently offered its faculty a substantial salary increase -- they had had none in two years -- in return for a contract terminable without cause, not in lieu of tenure, for they had none, but in lieu of their existing short term appointments. Not surprisingly, virtually all of them accepted. The administration then dismissed five senior faculty under that provision.[34] It had, of course, "purchased" the right to do just that; but we can legitimately be skeptical about the voluntariness of the sale.

The proposal errs far more fundamentally, however, in its very conception of tenure. Tenure is not a piece of property, a gift or special benefit disposable by the beneficiary acting in his or her economic self-interest. Regrettably, the United States Supreme Court has come close to that conception, identifying tenure as a species of constitutional "property" in order to require a hearing for its deprivation.[35] But the academic profession never made that claim. The brief **amicus curiea** of the AAUP before the Court, drafted by Professor William Van Alstyne, argued for the "broad recognition that the academic freedom and constitutional rights of nontenured and probationary faculty members do require **some** procedural safeguards in **every** case.[36] The Court rejected the profession's argument in a result that Van Alstyne later criticized for the very reason that it carried a notion "of personal entitlement and sinecurism that no constitutional court...should desire to encourage."[37] Not to put too fine a point on it, the profession was right and the Court was wrong. Tenure is not a piece of property. It is a means of assuring freedom in an institution of higher learning.

Perhaps an analogy of special relevance to this audience might be helpful. Prior to the Norris-LaGuardia Act, some American employers required prospective employees to sign a short form agreeing not to join a union as a condition of employment. It was known as the Yellow Dog contract, for in labor parlance it was said that only a yellow dog would sign it. But in neo-classical economic terms, these employers had to pay a price in order to "buy" that concession from their employees.[38] Why should employers not offer such a choice? Look at it in just the terms Chait has put his proposal: "If significant numbers of employees followed suit, the public might finally understand the value that employees truly attach to the freedom of association as a fundamental principle..."

The short of it is that we do not permit employers to purchase their employees' freedom of association. That freedom is not a gift or benefit subject to sale. Its exercise, even if rarely resorted to by the majority, goes to the potential of maintaining some degree of liberty in the workplace. So, too, of tenure. Fritz Machlup explained that some, perhaps many faculty would be pleased to "sell" their tenure for higher salaries. They rarely speak of act in a manner displeasing to higher authority and they do not expect to. They may even resent the disruption stirred up by the outspoken. Thus it is not surprising that Chait has discovered that contentment reigns among the faculties of institutions without tenure and that those who have sold their tenure, a self-selected lot if ever there were, are pleased to have done so. But it is important to the outspoken, and to us all, that the indifferent might have the capacity to become the outspoken or to rise to an issue if and when the need arises.

THE HALF TRUTH

Both Chait and Magrath point to a recent paper by Peter Byrne of the Georgetown Law School as evidencing how academic freedom might be assured without tenure. Chait outlines Byrne's essay in detail:

> The key elements include a peer-dominated review panel; a requirement that the faculty member make a *prima facie* case that a violation has occurred, whereupon the burden of proof shifts to the

> institution; an oral hearing held prior to the panel's decision; and the possibility of arbitration of still-disputed claims by an external tribunal of trusted academics.

These are indeed "the key elements," save one that Chait neglects to mention: the need to maintain independence of judgment by the members of the adjudicative body that hears complaints of violation of academic freedom and of the peer review panel that passes on the non-renewal of a now untenurable professoriate. Of the former, Byrne opines:

> The effects of tenure on academic freedom are pervasive. A simple example is the status of any professors who serve on the appeals panel discussed above. In our hypothetical tenureless college, these professors would themselves not be tenured. Their continued employment would rest to some extent on some of the very institutional decision makers whose actions they are reviewing. They simply cannot enjoy the independence of decision making that tenured professors would be able to enjoy. This might make them unwilling to question the memory or veracity of an official in one case, or to stake out a broad reading of faculty prerogatives in another. Thus might academic freedom shrink over time both in practice and in theory. At a minimum, professors serving on such a committee must explicitly be protected against retaliation by the institution; perhaps longer term contracts or even tenure would be desirable, to give them adequate independence.[39]

And the same is suggested on those passing upon non-renewal. Indeed, their position is "more tenuous than the members of the appeal panel" because they would be in the same department as the supervisor recommending the nonretention; consequently they too might need "some extraordinary job guaranty."[40]

So it seems that tenure has something to do with academic freedom after all. But once that is understood, the next question presents itself: Why should only the members of these committees be protected in the exercise of an independent judgment?

SUMMARY AND COMMENT

I have not unpacked it all. I hope I have unpacked enough to dispel any notion that the critics have given us "open-mindedness" or "incisive analysis." As for "civilized discourse," more that a decade ago Richard Chait and his co-author, setting out to "slay the dragon of tenure," bemoaned "the fate that befell Bloomfield College."[41] As I wrote at the time,he "fate that befell Bloomfield College" was a president who invoked finances to abolish tenure and fire (dissident) senior faculty when, as the courts conscientiously held, the finances justified no such action. Yet, despite the judicial determination of the lack of *bona fides* in the president's action, it seems to be the president, not the faculty, who receives the authors' commiseration.[42]

Now, more than a decade later, Chait intones, "Let Bennington be Bennington." This of an institution that, lacking tenure, dismissed 26 faculty members, the majority of long service, in a thinly veiled purge that brooked not dissent, and it did so in a "petty...vindictive and inhumane" manner.[43] (The characterization is by one of the nation's eminent economists and former University administrator of long service.) Again, it is the president and not the victims who receives Chait's support. In neither instance could the condonation of such squalid institutional behavior be considered "civilized."

What, then, is the assault on tenure all about? As Magrath and Chait have pointed out, it is in part a dispute over institutional flexibility and individual faculty accountability; but only in part and, perhaps, not even for the most part because under *these* heads Chait has observed that, "Tenure may not, in fact, be a substantial obstacle." These questions can be resolved with the full participation of faculty governing bodies and in a manner that is fully respectful of tenure as, I think, we are doing at the University of Illinois. Consequently, these concerns alone cannot explain the critics' extraordinary rhetorical excess. Something else is at work which Magrath captures, if unintentionally:

> The real reason that we hear so much passion about the importance of tenure from those who have it is not concern about freedom of expression. It is understandable fear and insecurity that many tenured faculty members feel about their status and economic security.

What Mr. Magrath fails to appreciate is what the regents and presidents did appreciate in 1915, that tenure *is* a question of the status of the faculty in the university. Peter Byrne has put the point elegantly:

> The debate about tenure is a debate about power....Opponents of tenure want administrators to have more power to deploy faculty as academic assets, in response to market and regulatory signals, to obtain greater benefits for students and society at lower cost. Defenders of tenure believe that faculty who have proven their professional competence should enjoy a measure of independence and dissent from the projects of administrators and regents, and from the preferences of students or of the public. This view depends on an understanding of the nature of scholarship and teaching, that it thrives in a context of free and mature academic judgment, rather than in response to signals or commands.
>
> ....In short, the case for tenure rests on the belief that the permanent faculty is the heart of any educational institution.[44]

When President Holt discharged Professor Rice at Rollins College in 1933, he dismissed the idea of a hearing thusly: "When you want to fire a cook, you don't go out and get a committee of the neighbors to tell you what to do, do you?" And when President John Slorp of the Minneapolis College of Art and Design unilaterally restructured the college's programs in 1991, he stated to the local press, "Those decisions were not going to be made in some sort of soup of homespun democracy." One cannot read all the blarney about "redefining scholarship" and "new career paths"[45] without the nagging suspicion that someone will do that redefining and set the hapless professor on that path. What saves the professor from that fate, from being *une administree*, is her tenure. Genuine negotiations can only be pursued between equal bargaining partners; and tenure makes the dialogue a little more equal.

The rhetoric is so hot because the stakes are so high. And, as I have tried to evidence, however so briefly, none of this is new. In, "Let Bennington be Bennington" we hear the unmistakable echo of, "No one has the right to question us." We have returned to the fundamental issue posed in 1915 and in virtually the same terms: Whether our faculties will continue to hold a place of independence in our colleges and universities.

ENDNOTES

1. "General Report of the Committee on Academic Freedom and Tenure" reprinted in Freedom and Tenure in the Academy 393, 397 (W. Van Alstyne, ed.) (1993).

2. Reprinted in The Reference Shelf: Academic Freedom 85 (1925).

3. Id. at 83-84 (italics added).

4. Quoted in Report of the Committee of Inquiry on Conditions at the University of Utah (July, 1915) at p. 17.

5. Quoted in Report of the Committee of Inquiry on Conditions at the University of Utah (July, 1915) at p. 17.

6. "The Independent" p. 5 (July 5, 1915).

7. Quoted in 59 Current Opinion 112 (Dec. 1915).

8. "The Independent" p. 5 (July 5, 1915).

9. Mecklin, Academic Freedom and Status, 3 Sch. & Soc'y 624, 624 (1916).

10. Kirkpatrick, The American College President, 18 Sch. & Soc'y 245, 247 (1923).

11. Bourne, The Idea of a University, 63 Dial 509, 510 (1917).

12. Is the College Professor a "Hired Man"?, 51 Literary Dig. 65 (1915).

13. Dewey, The Case of the Professor and the Public Interest, 63 Dial 435, 436 (1917).

14. Thomas, Trustees and Professors, 71 Independent 907, 907 (1911).

15. See, e.g., David Fischer, Taking on Tenure, US News and World Report (March 3, 1997) at p. 3; Editorial, Questioning Academic Tenure, Los Angeles Times (March 10, 1997) at B-4; Editorial, Tenure Tenacity, Washington Post (March 10, 1996) at C-6.

16. C. Peter Magrath, Eliminating Tenure Without Destroying Academic Freedom, The Chronicle of Higher Education, Feb. 28, 1997 at A-60; Richard Chait, Thawing the Cold War Over Tenure: Why Academe Needs More Employment Options, The Chronicle of Higher Education, February 7, 1997 at B4. Subsequent references to these writer are to these essays.

17. "Academic freedom is not...a constitutional right," a Yale student correctly observed in 1937. Comment, Academic Freedom of the Law, 46 Yale L. J. 670, 671 (1937). Twenty-five years later, William Murphy suggested that there was a "possibility of a substantial degree of protection of academic freedom" under the constitution. William Murphy, Academic Freedom -- An Emerging Constitutional Right, 28 Law & Contemp. Probs. 447, 449 (1963) (emphasis added). But as the editors of the law review accurately noted five years later, "The scope of protection afforded by the law falls far short of the normative conception of academic freedom..." Developments in the Law -- Academic Freedom, 81 Harv. L. Rev. 1045, 1050 (1968). The disjointure between the two has been discussed by Mark Yudof, Three Faces of Academic Freedom, 32 Loy. L. Rev. 831 (1987), by Paul Brest, Protecting Academic Freedom Through the First Amendment: Raising the Unanswered Questions, 67 Texas L. Rev. 1359 (1988), by Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment," 99 Yale L. J. 251 (1989), and by William Van Alstyne, Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unbiased Historical Review, 53 Law & Contemp. Probs. 79 (1990), among others.

18. A. O. Lovejoy (Letter to the Editor),"The Nation", Dec. 14, 1916, p. 561

19. Report of Committee A, 30 AAUP Bull. 13, 27 (1944).

20. Lovejoy, note 16, supra.

21. Quoted in M. Finkin, The Case for Tenure (1996) at p. 125 (emphasis added).

22. Felix Frankfurter Reminisces 102 (Harlan Phillips ed.) (1960).

23. Green v. Bryant, 887 F. Supp. 798 (E.D. Pa. 1995).

24. Erickson v. Marsh & McLennan Co., 599 A. 2d 793 (N.J. 1990).

25. Tavora v. New York Merchantile Exch., 101 F. 3d 907 (2d Cir. 1996).

26. Glasgow v. Sherwin-Williams Co., 901 F. Supp. 1185 (N.D. Miss. 1995).

27. Born v. Blockbuster Videos, 941 F. Supp. 868 (S.D. Iowa 1996).

28. Drake v. Cheyenne Newspapers, 891 P. 2d 80 (Wyo. 1995).

29. Bigelow v. Bullard, 901 P. 2d 630 (Nev. 1995).

30. Smith v. Pillsbury Co., 914 F. Supp. 97 (E.D. Pa. 1996) (in an intercepted e-mail exchange).

31. Quoted in U.S. News & World Report n. 13, supra (emphasis added).

32. Cathy Trower, "Tenure Snapshot", AAHE New Pathways Working Paper No. 2.

33. Jonathan Knight, Four-Year Colleges That Do Not Have Tenure: What is Shown by AAUP's "Annual Report on Economic Status of the Profession, 1995-1996" (on file with the author).

34. Set out in Richard T. Ely, Studies in the Evolution of Industrial Society 407 (1902).

35. Id. at 408.

36. Academic Freedom and Tenure: Minneapolis College of Art and Design, ____Academe____(1997) (in press).

37. Board of Regents v. Roth, 408 U.S. 564 (1972).

38. Brief amicus curiae of the American Association of University professors in Board of Regents v. Roth, id. at 4.

39. William Van Alstyne, Cracks in the "New Property": Adjudicative Due Process in the Administrative State, 62 Cornell L. Rev. 445, 484 (1977).

40. In fact, there has been a revival of the debate over the yellow Dog contract in just these terms. The debate is reviewed by Keith Hylton, A Theory of Minimum Contract Terms, With Implications for Labor Law 74 Texas L. Rev. 1741 (1996).

41. Peter Byrne, Academic Freedom Without Tenure?, AAHE New Pathways Working Paper No. 5 at 10.

42. Id. at 12.

43. Richard Chait and Andrew Ford, Beyond Traditional Tenure 241 (1982).

44. Matthew Finkir., *Book Review*, 10 J. College & Univ. Law 105, 111 (1983-84).

45. *Quoted in* M. Finkin, *The Case for Tenure* (1996) at 57.

THE FUTURE OF TENURE

D. A CASE FOR THE RENEWAL OF TENURE

Jean B. Keffeler,* Regent Emeritus
University of Minnesota

The program for this conference bills me as the participant who will argue the case against academic tenure. But you will not hear that argument from me.

I do not want to abolish tenure. I never wanted to abolish tenure and never said I wanted to abolish tenure. Granted, I did have the audacity in 1995 to request that the tenure code at the University of Minnesota be examined. And the mere fact that I raised the issue caused me to be labeled by self-proclaimed (and undisputed) faculty leaders as a demon, a Nazi, an enemy of tenure and a destroyer of academic freedom.

Many of you are interested in learning more about the "Minnesota Tenure Story," but to learn my views about the Minnesota experience, you will have to invite me to another forum. Suffice it to say that the Minnesota tenure code is one of the most rigid in the country, the grievance and judicial procedures are among the most cumbersome and the proportion of the faculty who are tenured or tenure track is unusually high. Yet, a number of factors combined to torpedo a modest reform initiative and demonstrate that at the University of Minnesota freedom of inquiry did not apply to tenure. The Minnesota experience is an excellent example of how not to undertake tenure review and reform. It is an example from which much can be learned, but it is not my topic today. Today I want to address the issue of tenure reform from a national perspective.

Let me begin by stating my objectives in the affirmative, rather than explaining what I am not against.

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*Professor Julia Davis, a member of the faculty of the University of Minnesota and former Dean on the College of Liberal Arts, presented this paper on behalf of Regent Emeritus Keffeler who was unable to attend due to a family emergency. Professor Davis also collaborated in providing ideas about ways in which faculty could take the initiative in instituting tenure reforms.

- I want to ensure the sustainable excellence of the American higher education system.

- I want to create the most favorable environment for the discovery new knowledge.

- I want broadly educated, intellectually vigorous students to penetrate our commercial, governmental and non-profit sectors.

- I want the practical challenges of our society addressed in the most direct ways possible by the brightest and most engaged scholars of our time.

The core tenets of the American tenure system are essential to the attainment of these goals.

Academic tenure is succinctly defined by William Van Alstyne in his chapter, "The Meaning of Tenure", published in Professor Matthew W. Finkin's recent book, The Case for Tenure.

> ...Tenure...provides that no person continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed without adequate cause. Moreover, the particular standards of adequate cause to which the tenured faculty is accountable are themselves wholly within the prerogative of each university to determine through its own published rules, save only that those rules may not be applied in a manner which violates the academic freedom or ordinary personal civil liberties of the individual.

Further,

> There are...certain circumstances in which tenure will not provide even this degree of professional security for faculty members of unquestioned excellence. ...Assuming that each of the affected faculty members, even though he possesses tenure, is either unable or unwilling to retrain and equip himself to be professionally competent in some other area of the academic program with sufficient demand to sustain his employment within the institution, his services may be terminated simply by the cessation of the program itself... (or) if there is an authentic financial emergency confronting the university...

Thus defined, tenure is as fundamental to higher education as "Buy low, sell high" is fundamental to successful portfolio management.

Tenure, however, in practice and policy, has been distorted and abused in ways that endanger academic freedom and breed institutional mediocrity and cynicism. For the most part, governing boards and presidents and faculty leaders have tolerated these abuses. And unless tenure is examined, with openness and honesty and intellectual rigor -- for the sole purpose of improving teaching and research -- tenure will suffer and the professoriate will fall further and further out of favor with the public.

Why do tenure advocates, at Minnesota and elsewhere, hear a request to examine academic tenure practices and policies and conclude so quickly that tenure is in danger of extinction? Why do we have difficulties in holding meaningful discussions about academic tenure? The answer may be that there are deep and systemic divisions across a range of issues in higher education and that boards and presidents and faculties do not trust each other to debate those divisions honestly.

Let me describe the key roles of the major players in the debate.

A trustee is charged with insuring the ongoing health and vitality of a particular institution. His or her primary work is the adoption of plans and policies (financial, programmatic and others) to insure the future growth and sustainability of the institution. This means stewardship -- stewardship of today's assets for their highest and best purpose, now and especially in the future.

Trustees of public institutions have an important added responsibility. They are responsible for insuring the relevance of the institution to the public from which it draws its charter.

Good governance requires that every significant institutional policy be examined for its suitability in advancing excellence and competitiveness.

A president is charged with executing the policies and plans of the board -- and getting results. A president is expected to counsel the board on the needs and aspirations and concerns of a wide set of constituencies -- students, faculty, donors, alumni, community leaders -- and to take these needs and aspirations and concerns into account in the policies and plans he/she proposes to the board. But the president is not a representative of these constituencies. Contrary to the hopes and even beliefs of many faculty, the president is, first and foremost, an agent of the board.

The role of the faculty is straightforward: teaching, research and service. But the situation of the faculty is complex. For a number of reasons:

- Public esteem for the faculty is diminishing.

- Faculty appear to have greater loyalty to their disciplines than their institutions. The "employment contract" is typically explicit and onerous with respect to the obligations of the institution to the faculty member and vague and relaxed with respect to the responsibilities of the faculty to the institution.

- Faculty are fiercely committed to the broadest possible exploration of knowledge. Yet institutions are obliged to identify investment priorities.

- To many faculty, including those employed by public institutions, the concept of the "public good" is irrelevant or unpersuasive. Value relativism is a part of their intellectual code and it argues in favor of sturdy (and sometimes messy) pluralism rather than combined efforts toward a common goal.

- Most institutions have built a chassis too large for their engines. Stated differently, they are underfunded given the scope of their operations. The gap between the scope of the programs and the depth of the funding has been chronic and has had a leveling effect on faculty productivity and institutional quality.

- Many faculty are underpaid, chiefly as a result of institutional resistance to fixing the chassis/engine fit. Complex arrangements for internal and external consulting have arisen to fill the compensation gap. These arrangements aggravate interdepartmental inequities and further weaken individual loyalty to the institution.

- Faculty are often badly served by their administrations. This is a function of administrative incompetence, rather than malevolence or conflicting goals. That is, too few academic administrators have know-how and experience in providing support systems for highly diverse, decentralized, and professional creative activity. The gap between the way faculty believe they should be supported (and, in fact, ought to be supported) and the daily reality of their institutional environment is fertile ground for rampant frustration and cynicism.

- Faculty governance systems are breaking down. The level of participation in faculty elections is low. The prestige and recognition once bestowed upon faculty senate and consultative committee members is giving way to mistrust and disregard. The quality of discussion is tedious and repetitive. And too often the topics under consideration are far from what really matters to protect the future well-being of the institution. The topics frequently do not deserve the high voltage brain power they receive!

- Lacking straightforward means, such as termination or layoff, for dealing with performance issues or shifting academic priorities, faculty rely too much on peer pressure as a means of internal discipline and priority setting. Thus members are frozen out rather than fired, and programs are starved rather than cut. Institutional culture and values suffer accordingly.

- Faculty are in the best position to apply the criteria that would underlie most strategic investment plans for improving institutional quality. Yet they appear loathe to exercise their roles in recommending institutional priorities -- other than the easy fixes of reduced administrative costs, higher tuition or cuts in buildings and operations. Sadly, faculty seem resigned to allowing academic freedom of inquiry to be constrained through the daily tussle of intramural politics and administrative end-runs. They appear unwilling (or unable) to engage in an understandable, rational and open process of priority setting.

So, it is no surprise that an effort to review the tenure code would meet with howls of outrage from the faculty. Why pick on the tenure code with so many other low-hanging apples in view: legislators not allocating enough money, trustees not finding enough money, presidents not forcefully representing the needs of the faculty and escalating numbers of inexperienced administrators tying the institutions in bureaucratic knots.

Who will break this dysfunctional cycle of deterioration, defensiveness, lack of remedy and further deterioration? And how?

The faculty can do it. They can do it by meeting two big challenges.

The first is to insist on meaningful participation in tough-minded, realistic planning. Although most of higher education has engaged in so-called strategic planning for the last decade, it has not been particularly effective in a variety of settings for a variety of reasons. But that might change if a few tactics are applied:

- Use the planning process as an opportunity to build ongoing relationships among key participants who need to understand the context and values from which each works.

- Promise to talk to each other, directly. Disregard third-party interpretations of character and motivation. Ask and allow no group or individual to speak for others. Allow no rumor to go unchallenged. Recognize that the press and the informal organization will work to accentuate conflict.

- Set one standard -- improvement in quality and competitiveness -- as the mark against which all proposals will be judged. Flexibility, for example, however valuable, is not a standard. Quality is.

- Develop explicit and understandable financial projections. Come to an agreement at the front end of the process with other key players -- trustees, administrators, political and community leaders -- about the assumptions underlying the financial projections.

- Require administrations to present plans as directional as they are lofty. In short, apply the same openness and rigor to the development of a strategic plan for the institution as would be expected in the disciplined work of the finest scholars.

- Provide your administration and trustees with information, not anecdotes. Examples include hard data, benchmark data, best practices information. Do anything that can be done to get beyond the natural insularity and myopia of the institution you serve, including its familiar social patterns and mythology.

- Ask the right questions of the right parties -- faculty, administrators, boards and deans. Recognize that there are necessary and helpful divisions of expertise and roles. Focus the expertise of the faculty on disciplinary quality and competitive strategy rather than on structure and systems.

- Demonstrate the capacity and willingness of the faculty to make tough decisions regarding academic priorities.

By now you are no doubt asking yourselves, "Why is she talking about planning and budgeting when we're talking about tenure and academic freedom?" The reason is that they are inseparable. There are three inexorable forces at work: demographics, technology and economics. Our job is to excel within the constraints of these forces. In addition, the public will no longer accept academic assurances about quality and excellence. The practical experience of many students and the confessional literature of higher education itself is too filled with indicators of dysfunction for the general public, let alone politicians and the media, to ignore.

The second challenge for the faculty in breaking the dysfunctional cycle is to seize the offensive to protect academic freedom and tenure by eliminating abuses. Some tactics to try:

- Initiate discussion of the pros and cons of tenure. And actively support governing boards in examining of tenure codes.

- Give "civilians" credit for having the brains, perception and plain common sense to understand the importance of academic freedom.

- Answer the following questions: Why are curricula outdated and slow to change? Why does the imbalance between research and teaching continue to dominate major universities? Why is available technology so under-utilized in the delivery of quality instruction? Why have the costs of education spiraled so far ahead of ordinary inflation? Why are reserves being depleted faster than

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  programs are being curtailed? Whatever aspects of tenure codes aggravate these conditions should be changed.

- Refuse to tolerate behavior that undermines society's confidence in tenure. Tenured professors are supposed to be the cream of the crop. The idea of tenure is to protect this most precious resource and to liberate it for unfettered teaching and research. Change the academic culture to one that is outspokenly intolerant of laziness, incompetence or malfeasance -- or invite continued attacks against tenure.

- Accept the likelihood that the incidence of personal and performance problems in academia is similar to that of other professional environments, and insist that the incidence and timeliness of identifying and dealing with these problems should correspond.

  Develop clear and reasonable guidelines for removing tenure when necessary. Be equally firm in the resolve to dismiss for neglect and incompetence as to protect faculty from arbitrary dismissal for unpopular political or social views.

- Develop standards for various changes already underway: What proportion of the teaching personnel should be tenured, or adjunct, or teaching specialists? What should be the ratio between full-time and part-time instructors?

- Undertake strong and organized advocacy for national funding for broad-based, pure research in both arts and sciences. This will be increasingly necessary for the advancement of knowledge as individual institutions predictably pursue more narrowly limited knowledge niches suitable for contemporary competitive positioning.

Notwithstanding all of the foregoing, ultimately if the public perceives that the academy is fulfilling its educational purposes -- the discovery of new knowledge and the dissemination of knowledge -- idiosyncrasies of individual faculty members will be tolerated and the concept of tenure will be embraced. What will not be tolerated is the refusal of faculty members to listen to and acknowledge public concerns about the perceived lack of interest in and commitment to teaching in general and undergraduate education in particular. This is not to argue that all faculty members should be engaged in the undergraduate curriculum, or, for that matter, teaching at any level. It is simply to recognize that in the eyes of the public, the overarching mission of higher education is teaching, and it is a mission that the public perceives has been lost in the pursuit of individual interests.

Tenure, in its original and high purpose, is essential to the achievement of the goals of higher education. The current turmoil over tenure reform is symptomatic of deeper issues. In the end, what is at stake is quality. The forces of the struggle are demographics, economics and technology. The nature of the struggle will affect the character and soul of an organization -- and ultimately whether it will garner the excellence necessary for competitive survival.

III. FACULTY, UNIONS, AND MANAGEMENT

A. The Regents in Higher Education

B. Faculty and Management Rights in Higher Education Collective Bargaining: A Faculty Perspective

C. Twenty-Five Years of Collective Bargaining: A Trustee's Perspective

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FACULTY, UNIONS, AND MANAGEMENT

A. THE REGENTS IN HIGHER EDUCATION

Saul B. Cohen, Member
New York State Regents

I am very pleased to be with you at this silver Anniversary Conference, and to share some thoughts on institutional issues facing higher education, particularly in New York State. I have been asked to speak from the vantage point of my current membership on the New York State Board of Regents, the governing body of the University of the State of New York.

Our structure is unique among state educational organizations because our mandate is all-encompassing. The Regents oversee higher education, both the independent and public sectors, and elementary, middle, secondary and continuing education. We regulate thirty-eight professions -- only law and medicine are excepted -- and charter the local libraries and museums of New York State, as well as being responsible for the State's library, museum, geological survey and archives. The mandate thus embraces our formal and informal educational and cultural institutions.

In recent years, the Regents have played a relatively passive role in regard to higher education. This is ironic inasmuch as the Board was first created in 1784 to oversee King's College (now Columbia University), and for most of the nineteenth century focused on higher education. Indeed, its full jurisdiction over "common" schools was only established by law in 1904. In part, this is because these days so much attention and energy is being dedicated to the improvement of public schooling, especially through the introduction of higher academic standards and the strengthening of various performance accountability measures. It is due also, however, to the passivity of the Regents in accepting the drastic reduction of SED's staff for higher education, and the consequent inability to effectively monitor programs. It is no secret that some members of the Legislature and Executive would like to reduce, if not eliminate our functions within higher education, as well as with the professions, and have us focus exclusively on pre-college education.

As a Board, we are now giving renewed attention to higher education issues. This State needs to have an oversight body in this area, and the strongest justification for retaining this function will be in our actions, not words. To this end, we are moving on a number of fronts:

1. streamlining the Master Plan Amendment process for registration of college and university programs and degrees;

2. developing a new and stronger system for the registration and re-registration of higher education teachers training programs, as well as of school teacher certification;

3. laying out a strategy for improving the quality of campus climate in college communities, some of which are becoming increasingly divided along racial and cultural lines; and

4. putting greater emphasis on our oversight of the governance of higher education institutions.

It is this last subject that has commanded a great deal of attention in recent months, and served to remind both the public and elected state officials that Regents oversight in higher education matters is necessary to protect the public interest. My reference, of course, is to the highly publicized Adelphi University matter. I served as a member of the three-person panel to judge the validity of the petition to oust the Board of Trustees, which was submitted by the Committee to Save Adelphi. Because some aspects of the case are still pending, I must follow the advice of our counsel to avoid comments that would deal with the specifics of the charges. I am sure that most of you followed the sequence of events, which was well covered in the press. Our panel held hearings for 27 days, took hundreds of depositions and questioned 29 witnesses, resulting in eleven volumes of depositions and 9,000 pages of transcripts.

The result of our panel's deliberations was the recommendation to oust all save one member of the Adelphi board, and the full Board of Regents accepted this recommendation. We immediately appointed a new Board and Chair. That Board took action which led to the president's resignation. While the president had been ousted in his capacity as a Board member, we do not have the authority to dismiss a university president -- only the institution's board has such power. An acting president has just been appointed, and the new Board will be able to conduct the search for a new president with care and deliberation. In addition, the attorney general has requested that the Regents consider a referral of the case to his office, pursuant to Education Law 226, so that he can take legal action against board members for possible violation of the not-for-profit corporation law. We voted to make this referral.

The case presents some general issues which should be of interest to a group such as this. First, the question of Regents authority. Education Law 226(4) states that the authority to remove trustees of private, as well as public colleges and universities rests exclusively with the Board of Regents. Removal of any trustee may be based on misconduct, incapacity, neglect of duty or failure of the corporation to carry into effect its educational purposes. The law requires a hearing in the proceeding for removal. Our panel set no time limit on the hearing, although none of us anticipated such a lengthy process!

The defendants challenged the authority of the Regents to hear the case, and later sought to stay the implementation of our findings. The court upheld the Regents at every stage, and ultimately the defendants resigned their Board posts.

An important principle of law that governed our decision was use of the general and ordinary meanings of "misconduct," "incapacity" and "neglect of duty," not as words of technical meaning. This follows Education Law 226. We also rejected the defendants' argument that the business judgment rule of corporation law should apply to this case. Our position was that the business judgment rule has never been regarded as absolute, especially as regards the educational and not-for-profit sectors, and that it does not apply when directors have either abdicated functions or failed to act. The burden of proof, of course, was on the petitioners, and the "substantial evidence" test was applied to our findings.

The Adelphi case highlights issues that surround university governance. In asserting the right of the Regents to act on the petition, we also fulfilled the responsibility to hold university boards of trustees to the standards that they have set forth in their own governance doctrines. Unlike private corporations and public boards of university trustees, independent university boards are self-perpetuating. The university community and the general public has, therefore, limited ability to correct board excesses. Therefore, when the Regents authorize charters of higher education institutions, implicit in this authorization is the expectation that trustees will conform to that charter, as well as to accepted practices, such as independent policy-making, ethical behavior and oversight of the management of university affairs.

Let me be clear. We did not set new rules of university governance in the Adelphi case. We measured the Board on the standards set forth in its own articles of governance, which are similar to those of most colleges and universities. These articles properly reflect the uniqueness of the academy, whose philosophical goals, modes of operation and governance structure set it apart from other not-for-profit organizations and from business corporations. The articles recognize the discrete, yet interlocking, functions that trustees, administrators and faculty play in academic matters. They follow the common university principle of shared responsibility, in which faculty input and voice are specifically called for. We did not, I must emphasize, take any collective bargaining into account. Rather, we took the position that Adelphi's Articles of Governance are enforceable and stand by themselves. We acted under state law to determine whether or not the trustees had failed in their duty to abide by and implement the articles.

Academic governance is complex. Trustees, administration and faculty have separate functions and roles that frequently give rise to friction. Interests can clash and boundaries can get fuzzy. I know this from the personal experience of having been, at various times in my long carer, a faculty member, department chair, dean and president. Indeed, at one point, I both chaired the faculty assembly and served as a dean in what was, admittedly, a unique type of consensually-based institution.

Overlap of functions is one matter, but neglect of function or intrusion into another's sphere is different. The balance is destroyed when faculty are eliminated from the triadic equation.

The university is not a perfect democracy. Its governance is hierarchical. But it is widely accepted that judgments on educational questions are best left in the hands of those with professional qualifications -- the academics. Curriculum, choice of subjects, teaching and research standards are the essential issues. Faculty does not wield unqualified power in these areas -- its judgment is subject to review by administration and board. Henry Rosovsky said it well in The University: An Owner's Manual (New York, W.W. Norton, 1990, pp. 277-278). "To function well, a hierarchical system of governance requires explicit mechanisms of consolation and accountability...and communication is a major form of accountability."

This echoes what Jencks and Riesman observed long ago -- that faculty control over the shape of the curriculum and appointments is rarely challenged, nor is their right to have a voice in choice of top administrators. While many faculty powers are largely advisory, with the exception of legal jurisdiction over setting curriculum, the recommendations of a unified faculty on academic issues are sought at all reputable colleges and universities and are heeded in nine cases out of ten. (The Academic Revolution, New York, Doubleday, 1968, pp. 15-18).

When the Adelphi case came to light, there were some who voiced the fear that Regents' intervention could open a Pandora's box, and that an avalanche of petitions from discontented faculty would follow. We doubt that there are many parallel cases in the colleges and universities of this state. However, if similar situations emerged and were brought to our attention, we would have the obligation to investigate. This is a responsibility we owe to the public and to the university community. The effort will have been worthwhile if boards of trustees and all sectors of the university community are reminded to be conscientious in regard to their governance guidelines, as well as other modes of conduct.

I note that one of these conference sessions is entitled, "Restoring Authority: The Need for Strong Presidents, Faculty Unions and Trustees." Balanced relationships are important to the well-being of the university. To avoid stalemates, however, clear cut mechanisms to facilitate consensual resolutions are required, if the strengths of the respective parties are to be exploited positively.

I am optimistic that the Regents are ready to take a more pro-active role in other areas of higher education. In particular, there is a strong sense of urgency on the need to review and strengthen teacher training institution standards. The overall strategy is to seek consensus from the field as to what constitutes a strong educational program for prospective teachers, craft appropriate standards, and then hold institutions accountable for them. This is a major challenge, and will involve greater university commitment to the allocation of resources for teacher training, and reconsideration of the basis for awarding tenure to those faculty whose major role should be teacher training rather than research. It will also require more active participation of school systems than is presently the case, especially if an internship model is included within the training process.

Present practices with respect to teacher certification are also being reviewed, which will require recasting of higher education courses now offered in the professional development of teachers. To this end, we are looking at the quality of testing levels for initial certification and the efficacy of a re-certification program. As you well know, this could have important consequences for collective bargaining and current tenure practices.

The Regents have much to do in fulfilling a proper and necessary role in higher education. This must be done in ways that are not intrusive and that are respectful of university prerogatives. The vitality of American society depends upon the strength of its educational system -- from pre-K to post-doctorate. It is a time for concerted action, and we look forward to working with the higher education community to achieve our common goals.

FACULTY, UNIONS, AND MANAGEMENT

B. FACULTY AND MANAGEMENT RIGHTS IN HIGHER EDUCATION COLLECTIVE BARGAINING: A FACULTY PERSPECTIVE

Ernst Benjamin, Associate General Secretary
American Association of University Professors

My discussion of "faculty and management rights," like that of most previous Baruch panelists, will explore how collective bargaining affects faculty performance of duties ordinarily deemed managerial.[1] That is, I will not try to delineate specific faculty and management rights but rather will consider what rights faculty share with administration, why such "shared governance" is beneficial, and how collective bargaining affects the faculty role in academic governance.

I begin and end with a consideration of Don Wollett's assertion, at the first Baruch Conference, that "faculties cannot expect self-governance through academic senates or similar vehicles to survive -- at least as institutions of significance, if they opt for collective bargaining." This assertion contains two explicit arguments: first, that faculty engage in self-government, and second, that if faculty chose to bargain they will lose self-government. This formulation prepares the way for his basic argument: that collective bargaining is preferable because it will replace a "romantic attachment" to "medieval" practices with "20th Century" personnel administration.[2]

I do not cite this argument simply to disagree with it. I do agree with my panel colleague, Caesar Naples, who took the opportunity of the Second Conference to rebut Don Wollett's argument and speak eloquently for the merits of continued faculty participation in governance.[3] And, I have long agreed with Caesar's more recent argument, along with that of Irwin Polishook and many others, that collective bargaining and shared-governance can and often do co-exist successfully.[4] Nonetheless, Wollett's arguments bear further consideration.

Wollett's choice of the term "self-government" rather than shared-governance is instructive. It enabled him to ask how the faculty can justify a system in which they are accountable only to themselves and to ignore the actual integration of managerial activities through shared governance.[5] By exaggerating the extent of faculty managerial authority, and indeed often conflating it with supervisory responsibility, Wollett heightened the apparent contradiction between shared-governance and collective bargaining. But, if his argument does not convince us, it or similar arguments did, as he suggested, convince the courts.

In the independent sector, where Yeshiva prevails, faculty governance and collective bargaining do not co-exist. Justice Powell's finding that faculty are managers because "their power in academic matters is absolute" is no less unequivocal than Wollett's attribution of self-governance though it is more clearly premised on managerial rather than supervisory authority.[6] I do not object so much to the exaggeration, as to the fact that the Court's failure to explore the nature of "shared governance" led to the finding that "the faculty's professional interests...can not be separated from those of the institution."

The consequent required "alignment of interest" between the faculty and administration not only provides the foundation of the finding that faculty are managerial employees but is in the words of Justice Brennan "antithetical to the whole concept of academic freedom."[7] What the majority of the Court, and Don Wollett, failed to understand is that the effective management of the university requires, indeed thrives, on a constructive tension between faculty and administration. This is why Howard Mumford Jones stated, in a classic defense of tenure in 1958, that "the code of academic freedom put forth by the American Association of University Professors (AAUP)...postulates an opposition between the administration of the American University and the true professional interests of the faculty mentors."[8]

The notion that a public enterprise might depend on the protected independent judgment of its employees, as we shall further consider below, finds little more support in state than federal court. But the issue is differently presented because, where state legislation has required the courts to respect faculty bargaining, the courts have not been able to deny, but only to circumscribe, that right by limiting the scope of bargaining. At the 1979 Conference, Jim Begin asked the interesting question whether "professionals, based on their special expertise, have a greater role in negotiations in determining policy than non-professionals."[9] Ironically, although Don Wollett discussed a draft California code which deprived the faculty of any managerial role, California is the one state where Begin found a code which provides explicit protection of faculty participation in managerial decision-making, though bargaining on these issues may occur only if the faculty senate defers to bargaining or the administration refuses to respect the senate.

The courts in New Jersey, Begin notes, have prohibited bargaining all matters ordinarily deemed permissive in the private sector on the theory that such bargaining would constitute an improper delegation of public power not to the faculty per se, but to a process independent of direct public control. Why a collective agreement is less subject to public control than any other contract, I leave to the imaginative reasoning of the New Jersey courts. More commonplace juridical reasoning generally finds that the issue is one of balancing the extent to which an issue is one of employment interests as against academic or public policy concerns.

Where, as Begin noted, the Michigan courts found that any issue which is "minimally a condition of employment," is mandatorily negotiable, the Minnesota Courts subsequently determined that only narrowly construed terms and conditions of employment are mandatory. The Michigan Court required negotiation of a teaching evaluation form, despite its prior approval by an academic senate as well as the administration, because the form could effect personnel decisions. The Minnesota Court found, on the other hand, that only the procedural steps but not the standards for such decisions were mandatorily negotiable since the standards shaped public policy.[10] Other states fall in between. None of these save New Jersey, to my knowledge, forbids bargaining on matters related to academic policy and, of course, all permit bargaining on the employment impact of academic decisions.

When faculty bargain matters of academic policy, bargaining is rarely over substance, but almost always limited to establishing and assuring the procedures for faculty participation and respect for faculty judgment in other venues. For example, the academic policies of concern to the Yeshiva Court, including program, curricula, admissions, grading, instructional format, and graduation standards, as well as specific faculty status decisions, are rarely, if ever, bargained. The faculty role in such matters is, however, as Barbara Lee has documented, frequently presupposed or ensured in collective agreements.[11] Accordingly, limits on the scope of bargaining are only material if, as in New Jersey, or hinder, as in Minnesota, the faculty agent from negotiating guarantees of faculty participation through shared governance structures.

The threat to the faculty role in shared governance rarely proceeds from bargaining, but rather from the denial of the opportunity to bargain or limitations on the scope of bargaining which prevent the faculty from protecting participation in governance. Despite the Court's professed respect for shared authority in the Yeshiva decision, Justice O'Connor writing for the majority in the Knight case observed that though there is a strong, if not universal or uniform, tradition of faculty participation in school governance, and there are numerous policy arguments to support such participation....this court has never recognized a constitutional right of faculty to participate in policy-making in academic institutions.[12] Similarly, I am not aware of any state court which, in limiting the scope of faculty bargaining over managerial or public policy, has found protections for the traditional faculty role in such matters.

Consequently, despite the judicially created conflict between faculty bargaining and faculty governance, the legal right to bargain is the principle source of the faculty's collective power, in many public colleges and universities, to ensure continued and effective participation in shared governance. This participation is increasingly threatened by the application to universities of the autocratic management practices Don Wollett identified with the "20th Century of Personnel Administration." Many seek to complete these developments which have led Justice Brennan to observe that "education has become a 'big business'" and that "the task of running the university enterprise has been transferred from faculty to an autonomous administration which faces the same pressures to cut costs and increase efficiencies that impact any large industrial organization."[13]

The effective governance of universities requires a creative counterpoint between the faculty's emphasis on professional academic priorities and the administration's representation of financial limitations and the comprehensive mission of the institution. Historically, the faculty achieved their influence by virtue of their market power in periods of university expansion and sustained this influence through practices created and institutionalized at such times. But only a small proportion of faculty at a small proportion of research universities, those most highly regarded as measured by the ability to command the highest price, achieve and maintain their authority based on their individual market power.[14]

In the absence of collective bargaining, the collective academic priorities of most faculties and their institutions lack foundation in market power or in law. Absent such a foundation, the academic and public policy matters the courts profess to protect depend increasingly on the decisions of institutional managers who are necessarily more responsive to considerations of cost, politics and administrative control than faculty. This is not to say that administrators are indifferent to academic priorities, anymore than to say that faculty are indifferent to cost or community needs, but clearly the emphasis and order of priorities vary.

Even in industry the notion that undivided management is more effective is subject to increasing question. In a review of recent management studies, Roger Alcaly finds numerous empirical studies to support the proposition that replacing unilateral management and job insecurity with employee participation in decision-making and job security improves the performance of their firms.[15] In universities, the need for the faculty's professional judgment should be evident in Justice Powell's summary of the faculty's managerial responsibilities:

They decide what courses will be offered, when they will be scheduled and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained and graduated.[16] If one recognizes that these are, in fact, decisions in which faculty and administrators share, one may reasonably argue about the appropriate relative weight to give to administrative and faculty judgment with respect to each issue. But those who believe that we would do well to shift the balance substantially toward administrative management should reflect on the structural imperatives that would lead to further substitution of economic and political for academic priorities in curricula, admissions, grading, and faculty appointments.[17]

Advocates of managerial administration who assure us that they will safeguard academic priorities despite the political and economic constraints are similar to advocates for alternatives to tenure who assure us they will protect academic freedom. Indeed, one need not be a conspiracy theorist to note that the PEW funded *Policy Perspectives* that we find the proposal that: "Changes in how the faculty regard themselves and their institutions lie at the heart of the restructuring process. What faculty are being asked to do is return -- in effect, to give back -- a portion of their ability to define their own tasks and performance standards."[18] On the other hand, the PEW funded AAHE New Pathways project seeks to organize the academic assault on tenure.[19] To complete the linkage the President of AAHE recently resigned to become the higher education officer for PEW.

The linkage is not conspiratorial but practical. Tenure is the legal foundation of individual faculty rights. Without tenure, faculty will lack the autonomy to exercise professional judgment without fear of retaliation. Those who seek to impose their agendas on higher education through managerial domination need to eliminate tenure and are prepared to do so -- even at the cost of offering "higher salaries, more frequent sabbaticals, more desirable workloads, or some other valued trade-off."[20] Remember when the opponents of faculty bargaining opined that faculty unions might trade off tenure? -- Unions didn't, anymore than they bargained away governance, so now AAHE proposes to buy off faculty one at a time in the name of "diversity."

Recent events in Minnesota perfectly illustrate the interconnection between tenure and governance, on the one hand, and governance and bargaining on the other. The Minnesota Regents set out to modify tenure. They set aside a compromise tenure reform proposal reluctantly put forward by the faculty senate and unilaterally proposed an alternative drafted with the assistance of a leader of the AAHE "New Pathways" project. This proposal not only sought to circumscribe tenure by increasing the oversight of tenured faculty and easing the procedures and standards for discipline and discharge. To facilitate "re-engineering" it also removed the faculty senate from significant involvement in program reorganization and required that the faculty maintain "a proper attitude of industry and cooperation with others within and without the university community.[21]

When the faculty senate, and even statements by the nationally prominent faculty, proved an insufficient obstacle to the Trustee's proposed actions, the faculty petitioned for collective bargaining. Only when the Trustees retreated and signaled that they would drop their more egregious proposals and the aptly named "Regent's Professors" withdrew their support, did the impetus to bargain diminish to the extent that the bargaining proponents lost by less than one percent of votes cast. The serious threat of collective bargaining successfully protected both shared governance and tenure where the nationally prominent faculty could not.

The University of Minnesota is the sort of leading research university in which academic values have heretofore been defended, as Seymour Lipset noted, by the market power of such leading faculty.[22] But public research universities have lost the support required to maintain their market position. One indicator of the declining market power of faculty in public research universities is the diminished salaries compared to private research universities: in 1975-76 nominal average salaries for full professors were $24,150 in public universities and $26,540 in private universities, by 1995-96 the respective averages were $69,750 to $88,050 and the proportion had declined from 91 percent to 79 percent.[23] Although public sector academic management seeks to protect its most prestigious individual faculty members by increasing internal differentiation, most public research university faculty are losing economic ground and individual influence.

Consequently, we have reached a situation in which the attack on faculty tenure and authority, particularly in the public sector where the fiscal squeeze generates recurrent public demands to subordinate academic to economic priorities, has provoked the faculty of a leading public research university to think the unthinkable. In these circumstances, it is not only not true, as Don Wollett proclaimed, that collective bargaining displaces faculty governance, but it is likely that only collective bargaining can preserve effective faculty governance in the public universities. The market may protect those few faculty, and students, who find a place in the small number of elite private research universities (and selective liberal arts colleges). Collective bargaining has become the essential legal and political foundation for faculty participation in shared governance in publicly supported universities. Collective bargaining is, therefore, the last, best defense of the academic priorities that determine the quality of education for the vast majority of students in the face of the perpetual fiscal crisis which continues to erode the quality of publicly assured educational opportunity.

ENDNOTES

1. Margaret Chandler (with Connie Chiang, "Management Rights Issues in Collective Bargaining in Higher Education," Proceedings, First Annual Conference, 1973, National Center for the Study of Collective Bargaining in Higher Education, pp. 58-66) did explore the propensity of most higher education contracts to include management rights clauses of varying strength and outline some of the areas in which faculty sought to participate in managerial decisions. With Daniel Julius, she further assessed these issues in subsequent conferences as well. ("By Whose Right? Management Rights and Governance in the Unionized Institution," Proceedings ..., 1985, NCSCBHEP, pp 89-117; and "Rights Issues: a Scramble for Power," Proceedings..., 1980, pp. 58-64). A more recent analysis has been prepared by Gary Rhoades, "Managed Professionals Unionized Faculty and Restructuring Academic Labor," unpublished MS, 1996.

2. Donald H. Wollett, "Historical Development of Collective Bargaining and Current Extent," Proceedings..., 1973, pp. 29, 37, 40.

3. Caesar Naples, "Collegiality and Collective Bargaining: They Belong Together," Proceedings..., 1973, pp. 51-55.

4. Caesar Naples, "Governance: Senates and Unions," and Irwin H. Polishook, "The Debate Over Faculty Unions and Governance," Proceedings..., 1989, pp. 10-27.

5. Wollett, op. cit, p. 33.

6. NLRB v. Yeshiva University, 444 U.S. 672 (1980), 103 LRRM 2533.

7. Ibid., 2537.

8. Howard Mumford Jones, "The American Concept of Academic Freedom," in Academic Freedom and Tenure, ed. by Louis Joughin, the University of Wisconsin Press, 1969, p. 240.

9. James P. Begin, "Scope of Bargaining: Implications for Traditional Faculty Governance," Proceedings..., April 1979, p. 51.

10. Ibid., p. 54; University Education Association v. Regents of the University of Minnesota, 353 NW2nd 534, 122 LLRM 2569 (Minn., 1984).

11. Barbara A. Lee, "Contractually Protected Senates at Four-Year Colleges." Proceedings..., April, 1981, pp. 56-61.

12. Minnesota Board of Community Colleges v. Leon W. Knight, 465 U.S. 271 (1984), 1115 LRRM 2785.

13. Yeshiva, 103 LRRM 2538.

14. Seymour Martin Lipset, "The Academic As Political Man or Woman," Proceedings..., April, 1989, pp. 7-8.

15. Roger E. Alcaly, "Reinventing the Corporation," New York Review of Books, Vol. XLIV, No. 6 (April 10, 1997), pp. 38-45.

16. Yeshiva, 103 LRRM 2532.

17. I have described the consequences of increasing managerial control at other Baruch presentations and will not repeat them here. See: "Unionization and Academic Excellence," Proceedings..., 1985, pp. 23-27; and "A Faculty Response to the Fiscal Crisis: From Defense to Offense," in Higher Education Under Fire, ed. by Michael Berube and Cary Nelson, Routledge, 1995, pp. 52-72.

18. Policy Perspectives, PEW Higher Education Research Program, February 1993, Vol. 4, No 4; p. 9A.

19. "New Pathways: Faculty Careers and Employment in the 21st Century," American Association for Higher Education, March, 1997.

20. Ibid, p. 5.

21. "Minnesota Board of Regents Policy on Faculty Tenure," Section 10.2, Draft of September 5, 1996.

22. Lipset, op. cit.

23. AAUP Reports On the Economic Status of the Profession for 1975-76 and 1995-96.

FACULTY, UNIONS AND MANAGEMENT

C. 25 YEARS OF COLLECTIVE BARGAINING: A TRUSTEE'S PERSPECTIVE

Candace de Russy, Trustee
State University of New York

All of you learned long ago of Niccolo Machiavelli, the shrewd, manipulative statesman and strategic thinker. But perhaps you don't know what Machiavelli is reported to have said on his deathbed. After agreeing upon the insistence of priests to renounce the snares of Satan, he murmured shakily, "Now is not the time to make new enemies."

Well, with Bill Scheuerman sitting here over to my right, I might do well to preface my remarks here today in a similar way: This is definitely not the time for me to make new enemies!

Hoping that this will not be the case, may I begin by saying how honored I am to have been asked to share with you my views and observations on collective bargaining. It is a charge that I approach with some trepidation since I have no formal background in collective bargaining nor am I an attorney. Rather I speak as a current Trustee of the State University of New York and a former faculty member. In both capacities, my abiding interest has been the need - not only at SUNY but throughout this nation - to raise academic standards and thus better educate students, particularly undergraduates. Nonetheless, I will venture to the best of my ability to address forthrightly some of those matters currently germane to collective bargaining.

First, as you all know, there has been a national debate within academe for years regarding faculty unionization. Faculty have strong opinions for and against unionization. I am among those who do not believe faculty should be unionized.

As noted by the United States Supreme Court in the Yeshiva decision,[1] University faculty have a "predominant role" in such personnel-related decisions as faculty hiring and promotion. Faculty exercise of traditional governance mechanisms in these and similar matters confers a significant supervisory dimension to their employment relationship. Thus, in my view, applying the industrial model of collective bargaining to higher education is inconsistent with faculty's professional status and incompatible with principles of collegiality and governance.

Also -- again generically speaking -- I think that both faculty and higher education institutions would be better served by smaller collective-bargaining units. Missions and institutional overhead, as well as costs of living, vary from campus to campus. From this standpoint, uniform, rigid agreements reached by huge unions might "shortchange" some faculty and institutions while overcompensating others.

Moreover, I believe that the focus of collective bargaining should be limited to, so to speak, "bread-and-butter" issues, such as salaries and fringe benefits. Especially in times of fiscal constraint such as now, it is financially unhealthy for our colleges and universities to have management, as it were, "hamstrung" by a string of agreements regarding, for example, grievances and limitations on courses to be taught by faculty. Better, in my opinion, to negotiate for better overall compensation for faculty. Better in the long run, too, for faculty - like trustees - to be more vigilant about the overall financial welfare of their institutions.

Secondly, concerning unionization specifically in New York State, the issue of whether public employees, including State University faculty, should be unionized was decided in 1967 with the passage of the Taylor Law.[2] This legislation requires all public employers in the State to negotiate and enter into agreements with public employee organizations. Unlike the National Labor Relations Act that governs the private sector, the State's Taylor Law does not exclude supervisory personnel nor does it distinguish higher education functions from other public services.

In addition, New York State statute provides for a single collective bargaining representative for all Executive Branch operations, including the State University system. For purposes of collective bargaining, therefore, the State, not the State University, is the employer. Further, the Governor's Office of Employee Relations[3] is the agent of the State for negotiating collective bargaining agreements with each of the State's public employee unions, including the United University Professions (UUP),[4] which represents the State University's faculty and professional staff.

Whether or not this structural arrangement could be improved upon (and I for one am not sufficiently knowledgeable about alternatives at this time to critique it), those who approve of it maintain that centralizing the State's collective bargaining function enables New York to deliver expert labor relations services, control costs, and maintain an integrated human resource management program across State operations. In this view, economic issues, particularly wage increases and employee benefit plan modifications, are issues of statewide concern and best negotiated by direct appointees of the Governor.

Third, permit me to suggest that the role of trustees in crucial decision-making, among other areas of collective bargaining, needs to be evaluated in a larger context, namely, with reference to the generally blurred lines of governance throughout most of higher education today.

As I set forth in more depth in an article in The Chronicle of Higher Education,[5] there is there is a need to restore balance between, on the one hand, trustee responsibility and institutional accountability, and, on the other, institutional independence, shared governance, and academic freedom.

Traditionally, the necessity for trustees to serve as final mediators and guarantors of the fiscal and, yes, educational integrity of their institutions was widely accepted within the academy. This acknowledgment of trustees' ultimate authority coincided with a beneficial tradition of consultation by trustees with other campus leadership groups. The view of faculty, in particular, were rightfully accorded considerable deference.

But in recent decades, an ill-defined extreme notion of consensus-building, or shared governance, has come to dominate decision-making in many colleges and universities. Shifting coalitions of faculty, administrators and students, with understandably vested interests, often jockey for special consideration within this lax, even erratic, governing structure. In other words, trustees have too often relinquished to these constituencies their fundamental de jure obligations - the most seminal of which is to appoint and review the performance of their senior executive officers.

Consequently, as faculty members themselves have noted, there is "leadership chaos" on many campuses. They have difficulty addressing urgent academic and fiscal problems and are often buffered from public accountability. Indeed, their great purpose - providing the best possible education and research at reasonable cost - has often been compromised.

Wiser and more effective governance can only come about, in my view, if the hierarchy of leadership is established anew. To achieve this, the roles of campus leaders must be clarified. Without being able to go into detail here, trustees must more proactively reassert their legal and moral responsibility to stand apart from campus factions, set broad policies for the good of their institutions as a whole, and hold them to account. The authority of presidents, as the Commission on the Academic Presidency recently recommended, also needs to be reasserted. They need the authority to lead their institutions and manage their resources. Furthermore, the area in which faculty advice is authoritative, should be considered, or need not be sought must also be delineated.[6]

It is from this overriding perspective - the need to restore balance within university governance so as to prove better, more cost-effective higher education consider the role of trustees in collective bargaining.

More to the point here today, I would also warn that the ability of this country's public colleges and universities to deliver high quality, cost-effective education can only be further weakened if the legislative authority of the trustees who administer them is diluted or negotiated away as part of the collective bargaining process.

Specifically, in New York State - leading us, **fourth,** to the role of SUNY Trustees in collective bargaining - the State University Board is entrusted by law, and I quote, for providing "standards and regulations covering the organization and operation of [their institutions'] programs, courses and curricula...."[7] This authority must be meticulously guarded in the current contract negotiations between the State and UUP.

Discussions regarding these Board prerogatives should be between the Trustees and the two State University organizations which represent the faculty, namely, the Faculty Senate and the Faculty Council of Community Colleges. They are not properly matters for discussion, much less negotiation, with the faculty union. The faculty union's representational authority extends only to terms and conditions of employment. Beyond that, opinion and recommendation should be extent of union involvement institutionally.

Further, SUNY Trustees need to determine which Board matters should be discussed with the two faculty organizations and which should be discussed with the faculty union. Board determinations in such matters should be consistent so that the faculty organizations/faculty union line does not blur over time. If in doubt regarding the appropriate body, the advice of legal counsel should be sought.

Also, upon due consultation with college presidents and senior level administrators, the Trustees should formulate the managerial objectives they would like to see accomplished through the collective bargaining process. Since negotiation is a bilateral process which, by its very nature, comprises a series of trade-offs, the Trustees should prioritize these objectives. Neither labor nor management will fully achieve its negotiating agenda.

As early in the preparation stage of negotiations as possible, the Trustees should communicate to management negotiators the institutional goals they have set for SUNY. The broad direction set by the Board for the system can have a direct and significant impact on the formulation of management's demands and the conduct of contract negotiations.

Collective bargaining agreements set forth the parameters governing labor and management's formal relationship for a defined period of time, often three or four years in duration. The Trustees should thus view contract negotiations as an opportunity to align employment-related matters with their institutional goals. A primary example of such alignment might be the structuring of the compensation system to reward excellence in accordance with standards established by the Trustees.

Additionally, SUNY Trustees should provide advice and counsel throughout the negotiations process on significant operational matters as well as economic issues. University administrators on the management negotiating team should work with the Trustees to establish parameters on how the system is willing to proceed on important negotiating items. Administrators should then keep Trustees apprised negotiations developments, seeking further consultation should it become necessary to re-examine certain parameters or objectives.

Just as the collective bargaining Agreement should not diminish Trustees' legitimate responsibilities, neither should it diminish campus administrators' authority to manage campus operations consistent with Board policies and standards. For instance, the Agreement should not impede campus administrators from regularly evaluating, in conformity with Board expectations, faculty contributions in teaching and research.

Fifth, and finally, let me more directly address the current status of UUP contract negotiations in New York State.

As some of you may not know, 21,000 faculty and other professionals employed by SUNY are represented by the United University Professions - or UUP. The State's Agreement with UUP expired July 1, 1996, and a successor Agreement has not been reached to date.

During the last two years, the Pataki Administration has negotiated new contracts with five other public employee unions representing 88% of the State's unionized work force.

The State seeks the right to contract out services in a manner similar to Agreements with its largest unions, CSEA[8] and PEF[9]. This ability to contract out on a selective basis would provide greater flexibility in managing costs and quality. Let me emphasize here: such flexibility would, in my view, strengthen SUNY institutions.

The State University believes the ability to contract out select services is particularly needed in the hospitals, where the cost structure is not competitive with that of other health care facilities.

The State seems in fact to be sensitive to the impact contracting out would have on affected employees. Governor George Pataki has continually demonstrated his commitment to mitigating the impact of actions that affect the work force through his sponsorship of such measures as early retirement incentive programs. The Governor's early retirement incentive program has reduced the number of faculty and staff layoffs during a time of need to exercise statewide fiscal restraint.

Under the State's proposal, employees affected by contracting out would receive preferential consideration for employment with the contractor, educational stipends, or severance packages based on length of service.

It is my opinion, that the tenure issue is being used by UUP as a tactic to alarm employees. UUP agreements have always permitted the State to lay off tenured employees for a variety of programmatic or fiscal reasons. However, the State's Taylor Law precludes the State from contracting out jobs exclusively performed by union-represented employees, even if no employee would be laid off as a result of the contracting out. It requires negotiations, and this, the State asserts, is its objective.

The State has told the union repeatedly that it has no plans to contract out on a wholesale basis, eliminate faculty tenure, or abolish academic freedom. To the best of my knowledge, UUP's claims to the contrary are simply untrue.

UUP has also been linking the concepts of tenure and academic freedom to the State's interest in being able to contract out services. However - and I wish to stress - tenure and academic freedom are mutually exclusive. Academic freedom is derived from the Constitutional right to free speech, as opposed to predicated on a promise of lifetime employment.

Where the State has the right to contract out services in the units represented by CSEA and PEF, it seems to have done so judiciously. Operations contracted out have included laundries, bakeries, and custodial services. In most instances, there were few involuntary separations.

UUP claims that contracting out is a union-busting mechanism. However, two years of experience with CSEA and PEF tend to refute that claim. Conflict seems to exist between the State's desire to consider, to the extent possible, the impact on employees in a contracting out situation, and the union's institutional concern to preserve membership levels.

One must question, furthermore, whether UUP really wants a new contract. UUP recently wrote to its members and told them that they have lost nothing by not having a new contract. In fact, UUP wrote that they were better off without a new contract because under the State's Taylor Law they have all the protections they under their expired contract.[10]

The UUP Benefit Fund has also emerged as a issue in contract negotiations. The Fund provided prescription drug, dental and vision benefits to UUP employees and their dependents through contributions made by the State. Based on negotiated contract language, the State believes its obligation to make contributions to the Fund ceased when the parties' Agreement expired July 1, 1995. UUP believes the State is obligated to continue making contributions to the Fund until a new Agreement is reached, regardless of how long that takes. An initial level decision by a Public Employment Relations Board (PERB) administrative law judge[11] was appealed by the State to the full Board. I understand the matter is currently pending before the Board.

In addition, a State Supreme Court Justice granted PERB's petition seeking injunctive relief in the matter.[12] The petition was granted prior to the transfer of UUP employees and their covered dependents to the State prescription drug plan. The court granted the injunction citing its doubt as to the State's ability to complete the "Herculean task" of assimilating the Benefit Trust Fund's participants into the State's plan in 10 days. The State obtained a stay of the court's order and successfully completed the transfer of all 45,000 covered lives in 10 days without incident. I have been informed that this matter too is currently pending appeal before the Appellate Division of State Supreme Court.

In fairness to the Governor in this matter, it should be recalled that he insisted that prescription drug benefits be continued so that employees and their families would not experience any hardship due to the lack of such coverage. Prescription drugs, in certain instances, can be the difference between life and death. While dental and vision benefits are used by many employees, they simply do not rise to the same level of importance or cost as prescription drug coverage. Dental and vision benefits have been suspended until a final determination in the litigation is rendered.

A last point: UUP may state that its membership has not received a general salary increase in four out of the last six years. Although this is correct, other State employees also have not received a general salary increase in four out of the last six years. Those unions which have reached new agreements with the State did receive "bonuses" or one time case payments of $550 in 1996 and $700 in 1997, respectively. I am told that the State's last offer to UUP included the same payments. In addition, a general salary increase of 3.5 percent is scheduled for this October and another 3.5 percent is slated for October 1998.

Despite the fact that there have not been general salary increases in four out of the last six years, it should be noted that State University faculty salaries remain competitive. For example, the average salary of a full professor at SUNY/Buffalo exceeds that of a full professor at public institutions such as University of California at Los Angeles, University of Wisconsin at Madison, and the University of Florida.[13] The average salary of a full professor at SUNY/Albany exceeds that of a full professor at public institutions such as PENN State, University of Texas, and University of Massachusetts.[14] And, the average salary of a full professor at the State University College at Brockport exceeds that of a full professor at public institutions such as University of North Carolina at Charlotte, University of Massachusetts at Dartmouth, and the University of Texas at San Antonio.[15]

By way of conclusion, forgive me if I repeat that contract negotiations are a bilateral process. In the current negotiations in New York State, I would suggest that it is unreasonable for UUP to expect all its needs to be satisfied without compromising on issues of importance to the State and the State University.

More generally, I wish in taking leave of you to reiterate that the academy today is in need of bolstering, both fiscally and academically. It is critical that all of us -- state governments, trustees, presidents, faculty members, and unions - coordinate in good faith.

For collectively we are, as one educator put it, "bearers of the tablets," those responsible for handing down, no less, the accumulated wisdom of the past. We cannot afford the luxury of indulging in suspicion and exaggerating our differences. We owe it to those who come after us to work together toward higher ends.

Distinguished colleagues, this is what the collective bargaining process ultimately is all about.

ENDNOTES

1. National Labor Relations Board v. Yeshiva University, 444 U.S. 672 (1980).

2.2. Public Employees Fair Employment Act, Article 14 of the New York State Civil Service Law. Chapter 392 of the Laws of 1967.

3. Established in 1969 by Article 24 of the New York State Executive Law to "act as the Governor's agent in conducting collective negotiations." The statute gives the Director of the Office broad powers to require State officers and agencies to take actions to comply with the State's obligations under its Agreements with employee organizations.

4. United University Professions (UUP) is the employee organization that represents the 21,000 faculty and professional employees employed by the State University of New York System. UUP is affiliated with the New York State United Teachers (NYSUT), the American Federation of Teachers (AFT), and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).

5. Candace de Russy, "Public Universities Need Rigorous Oversight by 'Activist' Trustees," The Chronicle of Higher Education, October 11, 1996, pp. B3-B4.

6. Report of the Commission on the Academic Presidency: Renewing the Academic Presidency, published by the Association of Governing Boards of Universities and Colleges, 1996, pp. 19-20.

7. "Powers and duties of trustees -- administrative and fiscal functions." Article 1(c), Section 355, New York State Education Law.

8. Civil Service Employees Association (CSEA) is the employee organization that represents approximately 85,000 State employees in support staff positions, the skilled trades, and institutional services. CSEA is affiliated with the American Federation of State, County and Municipal Employees (AFSCME) and the AFL-CIO.

9. Public Employees Federation (PEF) is the employee organization that represents approximately 50,000 State employees in professional, scientific and technical positions. PEF is affiliated with the AFL-CIO.

10. The Voice, January 1997, p. 4. The Voice is the official publication of UUP.

11. UUP v. State of New York, Improper Practice No. U-17765.

12. Public Employment Relations Board v. State of New York (Governor's Office of Employee Relations), No. 2230-96 (N.Y. Sup. Ct.: April 30, 1996) (order granting preliminary injunction).

13. Academe, March/April, 1996.

14. Ibid.

15. Ibid.

FACULTY, UNIONS AND MANAGEMENT

D. FACULTY AND MANAGEMENT RIGHTS IN HIGHER EDUCATION LABOR RELATIONS

Caesar J. Naples
Vice Chancellor Emeritus and Trustee Professor
The California State University

We have learned a lot in the twenty-five years we have been engaged in unionization and collective bargaining in our colleges and universities as a method of dealing with faculty involvement in the way our institutions operate. Actually, for some of us, it has been considerably longer than twenty-five years since the Taylor Law provided its comprehensive approach to labor relations in the public sector in New York and was quickly emulated in most parts of the U.S.

The early concerns centered around the *scope* of this process: what subjects were removed from the unilateral authority of the administration and what were now changeable only through the process of collective bargaining. Many observers were concerned that even institutions that had in place senates and other collegial processes that provided for considerable faculty involvement in institutional decision-making might find that these governance processes were no insulation against the ability of the bargaining process with its labor boards, unfair labor practices and lawyers to impose a new set of rules and values.

In the struggle over scope of bargaining, a number of issues had to be confronted and resolved before the process could settle down. Among the first was the role of the faculty in the administration of the university. Since the beginning of this century, faculty members have occupied a central position in the determination of many issues in American universities that, if translated into non-university terms, would have clearly been management rights. Among these are included the decisions over what would be taught; who would teach it; what evaluative criteria would be employed to determine hiring, continuation and promotion; even selection of those who would lead the institutions, prepare its budgets, oversee its academic programs and manage its human resources activities. Faculty involvement has traditionally been at virtually all levels from departmental and school committees to service on institutional governing boards. This tradition created significant ambiguity in identifying who was an employee, and the Supreme Court concluded that this traditional involvement of faculty in such matters made them, for collective bargaining purposes, part of management in many private colleges and universities.

Another ambiguity was created by the role of faculty senates. Were they "employee organizations" as that term is defined in labor law? If so, could they continue to function in the face of legal exclusive rights to represent the faculty that has been a cornerstone of nonacademic labor relations. Except for a few notable exceptions, senates continue to function alongside unions, and they have worked out their respective jurisdictions harmoniously. Indeed, the presence of senates has taken pressure off the bargaining table in more than one instance.

Then there were the mixed questions of educational policy and benefits, such as sabbaticals. Should senates continue to address these issues or should they be left to the bargaining process? These have been worked out in various ways, with compromises reached such as that which exists between the California State University Statewide senate and the faculty union in which the senate lobbies for funds for sabbaticals and oversees the policies governing them, and the union continues them as part of the collective bargaining agreement.

The role of faculty in peer review activities was initially perplexing to some, since it meant conducting a function most frequently done by supervisors in non-university contexts. This extends so far as to include playing a formal role in the evaluation of deans, vice presidents, and university presidents and extends the reach of the bargaining agent to the other side of the bargaining table.

Although there were few, if any, precedents to guide the early advocates on both sides of the table in reaching appropriate solutions to these conflicts, accommodations have been reached permitting much of academe's traditional shared governance and collegiality to remain along with collective bargaining. And, from time to time, public pressure for increased productivity and accountability has forced public sector managers to seek to regain some of the control over institutional functions and decisions that have been shared with faculty.

Perhaps the hottest battleground is the controversy swirling around the appropriateness of tenure. Critics and commentators are suggesting that tenure is a boondoggle, codling an elite professoriate while all the rest of us are subject to the normal and healthy buffeting of the economy and increasing productivity standards. They say that, at a time when total quality management programs require that each worker work harder and raise his or her standards of performance, tenure insulates faculty from close scrutiny and makes it difficult if not impossible to criticize or judge or increase their productivity. And they state that the system of tenure has no parallel anywhere else in the world of work and is not really needed to protect academic freedom so long as we have the First Amendment (which, by the way, applies to both tenured and non-tenured faculty), state laws against discrimination, and collective bargaining agreements offering processes and advocates to protect teaching and research.

Supporters of our tenure system warn that tenure remains central to a system of free and open inquiry; it is essential to protect controversial viewpoints; and without it, faculty would be vulnerable to reprisal for unpopular positions.

Now, there have been discussions into this peculiar and unique practice of ours from time to time, and I do not think that anything dramatic will occur during this round of scrutiny. Nevertheless, I do believe that such inquiries are appropriate and healthy things, and every so often, good changes are suggested and may be implemented. Most of the institutions of higher education and most faculty in the US are supported by public funds. The people have a right to look over our shoulders as we conduct our business (which is really their business), and they have a right to question anything that does not seem right and proper to them. If the tenure system appears to create a privileged class within the workforce, it is correct that we who participate in it and benefit from it stand up and be accountable for our support. If the system is a good one, it should be able to withstand questioning and perhaps that is the price that we pay for its continuation and the support we receive.

Unfortunately, some of the most prominent beneficiaries and advocates of the tenure system spend almost as much time criticizing those who raise the questions and conduct the scrutiny than they do answering the questions. This *ad hominem* approach to the proper debate forces any questioners to pay a dear price in invasion of privacy and personal embarrassment. We who live in a system that prizes free and open inquiry should be the last ones to attack the participants in that system merely because they espouse a contrary viewpoint and we do not like it. I for one, am not happy to see the extension of the concept of "Borking" into academic debate. It is a variation on the old law school advice in courses teaching appellate advocacy: If the law is with you, pound on the law, if the facts support you, pound on the facts; and if neither are helpful, pound on your opponent. Aside from the obvious and odious inconsistency of personal attacks in disagreements over principle, turning an academic debate into a political one always raises the danger of forcing the issue to be decided on the basis of who has the power rather than who has the more powerful argument. I would hope that the AAUP would conclude that the personalization used in Professor Perley's endpaper in the Chronicle of April 4, 1997 represents an individual excess of enthusiasm and not organizational policy.

There is in the article an implication that "professional" or "careerist" administrators are to be avoided in higher education. In a sort of Jeffersonian utopia where farmers would drop their plows and trudge off to Washington to serve their fellows in government for a limited time, the concept of faculty members temporarily leaving their students and colleagues behind in midfurrow while they attend to the nasty business of administration may appeal to some, but it's no way to develop expertise in budgeting, human resources management, planning, enrollment management and the like. One thing it is certain to accomplish, however, is to make it more likely that universities would be run by amateur administrators lacking training and experience rather than seasoned managers.

The further implications of this approach are somewhat more ominous. Perhaps the fear is that university presidents who don't see themselves as beholden to the faculty culture may be more amenable to governing board suggestions that universities should be run with an eye to consumer satisfaction, i.e., what do students want; what do taxpayers expect from their tax-supported institutions; what is the role of legislative and gubernatorial policy in setting institutional direction. Or, perhaps the concern is that trained or professional managers might be easily seduced by the goals of economy and efficiency. I am aware of the potential slippery slope in this area, but stacking the administration deck is not the right solution. When representatives of the public demand better-run institutions, we better pay attention. And I can testify from personal observation that amateur administrators don't stand a chance against elected officials and their skeptical staffs. And it certainly doesn't help to have institutions defended before legislative committees by those who run little personal risk if the institution should flounder since they have permanent job security under a tenure system. And, while I am as appalled as any as we watch the drama unfolding in New York, I suspect that there are many campus-based observers who harbor more than a little satisfaction as central offices are under siege and who may even encourage this activity.

Now, at the risk of personal attack, I am going to raise some questions with the system of tenure as practiced in a number of institutions around the country.

First of all, I support the concept of academic tenure. I see it as a useful way to screen faculty and identify those who possess the skills, desire, talent and achievement to take their place among the permanent intellectual core of our institutions. The severe scrutiny that leads to the conferring of tenure is among the most stringent anywhere in our society, and any faculty member who achieves tenure in this system can take appropriate pride in this achievement. The probationary period leading up to the tenure decision permits the tenured faculty and the university to consider in the most careful and deliberate manner the achievements, qualifications and promise of the candidate. Because of this lengthy and detailed review, the system of tenure has, I believe, resulted in a cadre of tenured faculty who are very well qualified.

Second, in conferring tenure on an individual, the university is proclaiming to the world that this person is worthy to be recognized as a fully qualified member of the academy. The tenured faculty member is universally recognized as member of the guild and, as such, is to be accorded all the rights, privileges and appurtenances pertaining thereto.

Finally, there is the job security aspect. Tenured faculty may not have their employment with the university terminated without just cause. Faculty members without tenure are subject to termination of employment upon proper notice, but are not usually regarded as entitled to just cause proceedings. This condition is true, by the way, even in those states that may require a hearing and charges for employment termination based upon implied clauses in an implied employment contract. A tenure

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system is usually sufficient to exempt probationary faculty or non-tenure track faculty from the implied contract.

But having said that for tenure, there are some serious problems with the way the system is implemented and with the counterproductive additions engrafted onto the central concept. These additions, frequently sought through the process of collective bargaining, make the tenure system something quite different from the basic protection of academic freedom, from the demarcation of acceptance into the guild, and even from any reasonable concept of job security.

Let's start with the utilization of vacant positions. Typically, a basic management rights clause begins with the statement that the University administration has the right to determine the mission of the enterprise. As a part of that right, management usually has the right to establish the means by which the mission will be addressed and the number and the types of employees that will be hired. These are customarily considered part of the institution's mission.

I believe that I have encountered in virtually every bargaining relationship I have run across in more than twenty-five years, a union demand that all vacant positions be filled promptly, and that the employees hired be tenure-track employees. Administrative resistance is usually met with derisive cries of eroding the bargaining unit, administrative desires to dominate the work force as numbers of non-tenured faculty increase and, that most dreaded claim of all: union-busting. If management defends its position by asserting the right to determine the number of faculty it chooses to employ, I have heard the argument that this will force the remaining faculty to work harder or more, thus undermining morale.

Next, let's look at the procedures, standards and criteria utilized in the tenuring process. Ideally, it would seem, the criteria and standards used to measure the appropriateness of a candidate for tenure would be those that furthered the mission of the institution. Since the mission is the province of the administration, any disagreement over criteria between management and the faculty be resolved ultimately by the administration. But this is not always the case. In California, for example, the state's collective bargaining law for the California State University system's twenty-three campuses state that standards and criteria applicable to the evaluation and tenure process be the joint province of the administration and the faculty senate. If the administration desires to remove standards and criteria from that joint jurisdiction, they become mandatory subjects of collective bargaining. It would seem that this alternative withholds from the management a key resource in meeting its institutional mission: the selection of appropriate faculty to achieve that mission. Let me interject here that I don't believe the observation that management may still determine the standards and criteria after it "goes through the motions" at the bargaining table. In other words, that it can insist on its version and either trade something else for it, or unilaterally impose it. Neither, as far as I'm concerned is consistent with the spirit of collective bargaining; so making it a mandatory subject of collective bargaining takes it out of the reach of management and seriously undercuts its ability to achieve its mission. I should point out, also, that this provision, as well as other important provisions of that collective bargaining law were significantly influenced by organized labor during the period when the governor's mansion and both houses of the legislature were controlled by liberals. This has not been the case for almost twenty years.

The procedures for achieving tenure have from the very beginning been regarded as proper subjects of collective bargaining. Faculty unions have negotiated them in detail, and they have been included in the collective bargaining agreement and subject to the grievance procedure. Failure to abide by the procedures -- however insignificant the deviation, may be regarded by grievance arbitrators as grounds for awarding tenure or additional employment. Whenever I have sought to add a clause to the effect that a minor or nonmaterial breach of the procedures shall not necessarily result in a remedy, I have met great resistance. This reaction reveals an attitude on the part of some faculties and their unions that they do not regard the relationship of administration and faculty in the tenure process as a partnership, but rather as an adversarial one.

This attitude reached full manifestation in the collective bargaining agreement between the Florida Board of Regents and the faculty union when the union sought to remove the faculty departmental committee as a hurdle in the tenure process. Rather than agreeing that the departmental faculty played a role in screening out unqualified faculty, the union argued that the role of the faculty was to advocate for the candidate, be supportive of the candidacy, and in no way should be critical. "You're trying to get us to do management's dirty work for it," the then union president told me.

With this attitude pervasive, it would seem inevitable that management would not value faculty assessment quite so highly as it would if the faculty were joined with the administration in seeking to identify the most highly qualified faculty. Of course, in grievances over tenure, that union constantly argued that the administration failed to give proper weight to the assessment of the faculty.

We have heard the argument that tenure is necessary to protect academic freedom, and we have seen provisions of negotiated agreements that permit review by arbitrators of employment termination decisions where it may be claimed that the decision was in violation of the faculty member's academic freedom. But another aspect of tenure that isn't often recognized when enumerating the basis for its existence arises when an institution attempts to change its offerings. When General Motors or Ford decides to no longer offer a particular model car to the public, it must deal with the provisions of the layoff clause in its collective bargaining agreement. If advance notice must be given, or severance pay provided, that is considered part of the cost of doing business and is a factor in the decision. In a university, it's a bit more complicated. Although the array of courses offered by the institution would appear to be an important part of the mission of the institution, faculty unions often seek to insist that faculty be a significant part of the decision, which courses to offer and which to drop. In fact, even if the faculty collective bargaining agreement clearly cedes that right to management, the AAUP has sought to censure institutions that don't involve the faculty in such decisions adequately enough.

Exactly what is enough faculty involvement isn't clear and would appear to be relatively subjective. But what is clear is that regardless how closely or logically tied to the institution's mission, the decision which courses to retain or drop is not accepted as part of management's right to determine the mission of the institution.

Another aspect of tenure and its true definition arises in considering the difficulty universities have in reducing the size of its faculties or adjusting them to meet new mission goals. Many faculty advocacy groups do not recognize the right of a university to layoff tenured faculty unless the institution is undergoing financial exigency. That term apparently means whether the institution has enough funds to meet its tenured faculty payroll as a first priority for its resources. All too frequently, faculty unions argue that the institution is obligated to keep its tenured faculty on the payroll until every last non-tenured faculty member has been let go first. If there are courses being added or expanded, the argument is made that this is evidence of a lack of financial exigency and therefore, there is no legitimacy to the decision to layoff tenured faculty. In a celebrated New Jersey case, the faculty argued and a judge agreed that the university was required to sell its golf course in order to pay its faculty. Implicit in that decision was the principle that tenure represented a commitment to liquidate anything that could be sold to sustain the tenured faculty on the payroll.

Not very long ago, the California State University faced a fiscal crisis that threatened to reach the tenured faculty. Most university presidents decided to eliminate part-time faculty members from the payroll, wherever they might be, irrespective of the disproportionate impact this approach might have on programs. If, for example, bubble chamber physics had three tenured faculty members with low student interest, those faculty members would still be retained while non-tenured faculty in the heavily-subscribed human resources management program were let go. This would be done even if this decision might mean that students might be dropped or might drop out themselves because the university would no longer be offering courses of interest to them.

One courageous -- if foolhardy -- president refused this illogicality and insisted that undersubscribed programs be completely eliminated. He satisfied himself that the programs he eliminated could be obtained at adjacent state university campuses, although not at his own. This resulted in the proposed elimination of a number of tenured faculty in those discontinued programs while some non-tenured faculty members would continue to teach in programs where student enrollment was growing. The faculty outcry was heard as far as Sacramento and Washington, DC and soon a team of faculty investigators was on campus, dutifully taking down the details of how faculty recommendations were ignored. The conclusion: Surprise! Inadequate faculty involvement in the decision because many faculty members and the union disagreed with the decision; a failure of collegiality because once it was clear that the administration and the faculty were at an irreconcilable impasse, the president determined to proceed; and a demonstrated lack of fiscal exigency because other departments were hiring new faculty to meet the student demand in those areas. The story has a happy ending, though, since neither the campus not the system was censured because the president's decision was reversed at a higher level.

This example illustrates still another aspect of the concept of tenure: tenure determines which programs will be offered. Said another way, the tenured faculty will remain on the payroll while non-tenured faculty are laid off first -- without regard to the fact that they might be in different programs or different departments; or that student interests will be ignored and, perhaps, student enrollment might suffer.

Faculty unions have insisted that tenured faculty members whose programs have been discontinued be offered positions in other departments where vacancies amy exist. If they are not qualified to work in those departments, unions have sought institutional funds to retain faculty with unneeded disciplines. While this certainly represents a humane response to problems of retrenchment, it is generous beyond anything that exists in industry. And it is justified by the concept of tenure as an institutional commitment for the working life of the individual.

Once, when a union with which I was bargaining took this position, I suggested that a laid off faculty member should enter a new department with full seniority -- perhaps making her more senior (and therefore, less vulnerable to future layoff) to faculty who were already members of the department. The union went berserk and, unable to balance the rights of the individual and the rights of the faculty already in the department, as well as the rights of the department to select its colleagues, it dropped the demand.

In another instance a union insisted that future vacancies be filled with full-time tenure track appointees even though part-time faculty were not in the bargaining unit represented by this union. The union argued that unless its proposal was accepted, the administration might expand the class of faculty members with lesser protection from layoff. In response, I proposed that layoffs be accomplished strictly by seniority irrespective of tenure status and length of appointment. Under this proposal, all faculty: full- and part-time, tenured and not, would be arrayed on a layoff list by length of service. This proposal was rejected because of another attribute of tenure: superseniority. Every tenured faculty member is considered by protectors of tenure as senior to any non-tenured one even if the faculty member without tenure has longer service. The implication of this approach on women and men who move to part-time service to care for their families is apparent.

Now, I did not say that there might be no instances in which tenured faculty might be laid off. There might be no non-tenured faculty left and the need to economize might persist. Or the collective bargaining agreement might expressly permit layoff by program or course (as did the original faculty contract at the State

University of New York). But the impact of tenure doesn't end there. Virtually all collective bargaining agreements prescribe procedures for rehiring faculty once funds are made available again to the institution. And many of these provisions require that faculty be rehired in either seniority order or in reverse order of layoff -- so long as tenured faculty are brought back first before non-tenured faculty. This might mean that underenrolled courses might be revived before those which have attracted greater student interest. Again, public institutions may be required to ignore the needs of the public.

What I have attempted to describe in the foregoing is not intended to be an undifferentiated broadside against tenure. Tenure is a good and needed system as it is described by its advocates: a system of detailed and stringent scrutiny to determine the best qualified faculty; a validation and proclamation to the world of the acceptance into the guild of the faculty member who is tenured; and a system of protection against political or whimsical reprisal resulting in loss of employment so that faculty members can freely inquire and explore unpopular ideas. What I have tried to point out is that the elements of tenure that are publicly defended are not those aspects that make it objectionable. There are a number of problem areas in a tenure system that are rarely the object of focus and rational discussion. I am concerned that the nature and heat in the current debate will do little to resolve the dispute. The real issues that lie at the heart of the criticism that tenure makes institutional improvement difficult are not being addressed. And, not being addressed, these issues continue to engender opposition that threatens to damage a very useful and necessary protection central to the role of the academy. If tenure is to be looked at, it is these unacknowledged elements that need to be addressed. To define the debate as an assault against academic freedom and to defend tenure as a bulwark against such attacks is polemical misdirection.

FACULTY, UNIONS, AND MANAGEMENT

E. AUTHORITY FOR WHAT?

William E. Scheuerman, President
United University Professions

The title of our panel, "Restoring Authority: The Need for Strong Presidents, Faculty Unions, and Trustees" is misleading. It implies that presidents, unions, and trustees have all somehow lost the authority they once had and now need to restore it. Perhaps for about twenty minutes in the late sixties and early seventies, some presidents and some boards of trustees felt that they had lost control of their campuses to student protesters and faculty radicals. Whatever the reality, this perception was sufficient excuse to usher in the era of the corporate management model in academe, complete with tough-minded CEO presidents who styled themselves somewhere between benevolent dictators and Attila the Hun. Twenty-five years later, what board of trustees or campus president has not seen their authority restored many times over by now.

As for unions, they barely existed in higher education back in those days of rage. Scholars have noted that faculty senates increased their power during these times.[1] Also during that period, faculty, in fact, engaged in the struggle to create unions as a direct response to the growing power and authority of administrators. Standing here in April 1997, I am not going to make a case for the need to restore union authority. Twenty-five years ago, higher education unions were in a nascent stage and have been building authority ever since. So how do you restore what was never lost? I will argue, however, that the ascent of a new breed of trustee and president makes it absolutely imperative that faculty unions draw all their strength and authority around them now as we battle to preserve public higher education as we know it.

Having made the claim that the title of our panel is misleading, what name would I give it? Why not begin by asking the jugular question: Authority for What? That is, how is the authority going to be used?

First, let us consider the rise of so-called "activist trustees" and their drive to redefine the public university. What do they mean by authority and what do they want to do with it? Here is what they are all about. On a most general level these new trustees are seeking the authority to implement an extreme right-wing political agenda. What is on this agenda and how does it play out in the public university?

My initial impulse is to spout the line they always use: We need to do more with less. But when you examine what they advocate, it becomes clear that is not what they intend. They actually want to do less with less. Let me explain.

Keep in mind that they make no bones about wanting to dismantle government as we know it. Their rap is that government is the problem. Government is expensive, wasteful, inefficient and often heavy-handed. From their perspective, sound public policy shifts resources from public to private enterprise, which, of course, is never expensive, wasteful, inefficient or heavy-handed. The realized savings go back to the private sector in the form of tax breaks for business and the wealthy and trickle-down prosperity for the rest of us. If freed from governmental regulation, the magical workings of the marketplace will benefit us all.[2] Of course we know how well this worked in the early eighties when a combination of massive defense spending and huge tax cuts for the rich created high unemployment and the largest federal deficit in U.S. history.

It is no accident that Trustee DeRussy, one of SUNY's activist trustees, is a founding member of the anti-tax PAC CHANGE-NY. But she is not alone. Follow the coverage in *The Chronicle of Higher Education* and you will discover that, when you scratch an activist trustee, you invariably find a tax-cutting, anti-government zealot.[3]

How does their platform affect higher education? Let us remember that public higher education is a big budget item, and keep this in the context of their anti-government, anti-tax political ideology. In New York State the Governor replaced SUNY trustees who were opposed to massive budget cuts with "activist" trustees who parrot the old saw that we can do more with less. The result was a first in SUNY's history! Rather than call for a larger budget or even a budget that just covered the cost of inflation, the trustees' budget proposal for FY '98 called for a real cut of $21.8 million, and this before the Governor had a chance to propose another $147.3 million in cuts.[4]

In addition to their budget proposal, the SUNY trustees have issued their new vision of the university. Their document, "Rethinking SUNY," spells out their plan to restructure SUNY through the principles of the marketplace. They want to dismantle SUNY'S central administration so that the campuses may compete with each other in a Darwinian struggle for survival. Each campus would, among other items, determine its own tuition, its own dormitory rates, its own admission standards, and its own mission. In effect, a unified system would be replaced by sixty-four colleges each going its own way. This move would bring us back to the days prior to the formation of the university. The fact that the competition does not take place on a level playing field makes disaster for some institutions imminent. Imagine, for instance, SUNY Buffalo with its large foundation, 12 graduate schools, and 28,000 students competing for the students of a small nearby four-year comprehensive college. Which campus do you think would prevail? This competition is akin to the 800 pound gorilla crying "Everyone for himself," as he stomped among the chickens. Is this Darwinism gone ape, or what?

The budget numbers are the "less" that the trustees aspire to. Is decentralization the "more?" Not if the unfair competition leads to programmatic shutdowns and campus closings. But perhaps by more the trustees mean more authority for themselves. Decentralization destroys the university as a system, weakens the power of the chancellor and creates new possibilities for a cohesive group of trustees with centralized power to foist its agenda downward on weakened college presidents. Maybe there are other ways to get more for less. Let us see what else these activist trustees suggest.

Putting aside the fact that the United States' system of higher education is still the world's best, all these trustees claim that standards need to be increased. How does this principle fit into their "less-is-more" equation? The starting question is: What do these activist trustees mean by standards? On this point they are clear. Standards to these people have a lot, if not everything, to do with who is admitted to institutions of public higher learning, what they are taught when they get there, who does the teaching, and who manages these institutions.

On the issue of what students are taught, Candace DeRussy, according to a recent *Chronicle* article, has urged trustees not to shy away from "a battle of content." "When we encounter dysfunctional curricula," she continues, "curricula that are inappropriate, politicized or trivial, it is my view that we have an obligation as trustees to confront this problem...We should do battle over this."[5] Another activist trustee, a member of the Christian Coalition, comes right out and says what Trustee DeRussy implies. He argues that trustees should tell the faculty what courses they should or should not offer. "I'm planning to go course by course in the James Madison manual to see what I don't like and what I think doesn't have a place on our campus," he boasts.[6]

It is apparent that these activist trustees are ignoring a basic tenet of the academy, that it is a place of discussion, dialogue and shared governance. Its mission is to seek the truth; and, to accomplish this goal, paradoxically, no truth should go unquestioned. Indeed, most faculty would agree that a student graduating from college who does not know how to ask questions has not received a very good education. So why should the faculty abdicate their intellectual commitment to raise questions? What gives these new trustees a monopoly on truth? Are we to accept their truth on faith? If so, let us close the universities down now and get it over with.

It is good that trustees raise questions. It is their answers that I find troublesome. Trustee DeRussy might even be surprised at how close she and I are on some academic issues. But that is beside the point. It is beside the point because whatever our personal feeling or beliefs, the university is not the place for politicians or their appointees to foist their beliefs on other people. The people who are trained to teach the courses, the scholars and researchers, in short, the educated professionals who have mastered their subjects, are the ones who collectively debate and decide what courses they should offer. This ongoing debate is what shared governance is all about. Scholarly decisions should be made by the community of scholars, not by outsiders with a political agenda.

Imagine what might happen to the academy if trustees had the authority to set college curricula. We currently have conservative trustees who want a "conservative" curricula. Maybe next year we might have liberal trustees who want to implement a "liberal" curricula. The value of academic freedom, so critical to the life of the mind, would disappear. Does learning not require both diversity and stability? If activist trustees had their way, we would have neither.

What about whom they let in the university? It appears to me that the activist trustees equate standards with elitism and sometimes even worse. For instance, listen to what one of the new trustees from California has to say on this issue: "Citizens say it's time we get those people over at the university to understand that the values of our society are not about preferential admissions, separate graduate ceremonies, and black student unions."[7] Rather strong language but crystal clear.

Put this attitude in the context of proposals to cut remediation, redefine admission standards, and reduce financial aid for the poor; and draw your own conclusions. Throw in the trustees' concern for teaching only the great books and eliminating such frivolous courses as women's studies, black studies, in fact, almost everything that deals with cultural diversity, and you get a picture of what these activist trustees would "add" to the university with their reduced resources. Interestingly, one of the more thoughtful opponents of cultural diversity is now backtracking on this issue. The eminent neo-conservative Nathan Glazer now admits in his latest book, *We Are All Multiculturalists Now*, that for African-Americans the melting pot principle just does not work. Perhaps Glazer's epiphany will inspire some of the activist trustees to rethink their position. I hope so.

Who should teach in the university? Certainly not people with tenure. Consider how activist trustees treat tenure. To them tenure provides a sanctuary for deadwood, socialists, and other forms of degenerates. The fact that tenure is little more than due process, that less than forty percent of the professoriate are tenured, and that tenured people work harder than their untenured colleagues is conveniently overlooked in the mad dash to reduce costs and increase academic purity. Am I exaggerating? Just consider what is going on at the State University of New York. State negotiators, backed by the trustees, say they do not want our tenure, they just want the right to outsource every one of our jobs. I am slow. Perhaps someone can explain the difference to me.

Let us put aside the educational implications of the loss of tenure. This is indeed a large put-aside because we know that, without tenure, academic freedom would disappear and with it anything resembling quality education. Consider instead the power implication. From the trustees' perspective, eliminating tenure means more power for them, since there is no permanent faculty to resist their assault on the life of the mind.

The trustees' approach to standards and the marketplace shows just how their ideology muddles their thinking. In their Darwinian world of a "rethought" SUNY, will competition really improve standards? As campuses fight for the revenue embodied in warm bodies, are admissions policies not likely to seek the lowest common denominator? What courses will we offer to attract students to our institution. The hard sciences and foreign languages are tough. They do not draw many FTEs. They are expensive. So why not offer scuba diving instead? And what about the money institutions will have to spend to attract students? Would that money not be better spent on educating students?

Now we have a pretty good idea about what activist trustees would do with their new authority. In fact, the dynamics I have outlined to this point lead me to extrapolate in the form of a principle. I call this principle Scheuerman's Law of the Conservation of Authority. The law is this: On any given college campus the amount of authority remains constant. It can neither be created nor destroyed. But, wow, it sure can be shifted around!

Please keep this law in mind as we answer the question "authority for what?" as it might be answered by college presidents. I cannot resist a brief digression by reminding you of what Thorsten Veblen in *The Higher Learning* identifies as the primary responsibilities of any college president: real estate and public relations. *The Higher Learning* was written in 1913. If anything has changed since then, it is the political response to the sixties of seeking out new college presidents who would send students and faculty back to the classrooms and keep them there. Whenever we talk about a president's gaining new authority, you can safely bet that it is at the expense of shared governance. The tug-of-war between college presidents and college faculty is an old story. But in recent years public college presidents have pulled ahead significantly through the power of the purse as their operating budgets stagnated or shrank as part of the general fiscal crunch on the states.

This state of affairs is reflected in the title of a recent report by the Commission on the Academic Presidency, a body created by the Association of Governing Boards of Universities and Colleges: "Renewing the Academic Presidency: Stronger Leadership for Tougher Times." The report pays lip service to shared governance but argues, "What some academic insiders take pride in as democratic decision-making is, in reality, a web of inefficiency that severely limits the ability of some colleges and universities to address the urgent issues they now face."[8] Faculty may still participate in the hiring process and debate the curriculum, but the president's budget, filtered down through deans and department heads, dictates faculty lines and educational resources.

If presidents are enjoying a momentary surge of authority at the expense of faculty, on the one hand, on the other they are finding their authority being drained off by activist trustees. For instance, if the trustees' vision in "Rethinking SUNY" comes to pass, SUNY campus presidents will find themselves competing with each other for smaller pools of money, students, and other resources. Sure, they have new authority -- the authority to compete with sixty-three other campus presidents. Some will win and some will lose...everything! How will this competition affect the power relationship between college presidents and the activist trustees? The trustees will be like the wise man of the Chinese proverb who sits on the mountain top and watches the tigers tearing one another apart below. Let us not forget Scheuerman's Law.

Of course I have not even mentioned the role activist trustees are playing in presidential search committees. As a recent article in the *Chronicle* suggests, these trustees are not looking for outstanding scholar-administrators to lead their campuses; they want a president who will help them advance their political agenda. The article reports, "Friends of Mr. Bartlett [former SUNY Chancellor] say he felt that several of the trustees...acted like 'local ward heelers.'"[9]

Now what about the authority of faculty unions, and the question of authority for what? An increase in the authority of both trustees and campus presidents can only be realized at the expense of faculty. Scheuerman's Law again. Consequently, unions give the faculty a mechanism to hold on to their power. To return to the title of this session, we need strong unions because they are the last faculty bastion to protect academic freedom, tenure, and basic control over such terms and conditions of employment as workload and salaries. The question, then, is how do unions increase their strength? The UUP example might be instructive.

The offensive against faculty by activist trustees and campus presidents is manifested in bad institutional budgets and increasing pressures on the faculty to do more with less, even though, as I have tried to show, this usually means doing less with less. The union requires both an internal and an external response. Internally, we have increased our strength by keeping our members informed every step of the way. Mass mailing, campus visits, and meetings with elected chapter officials enabled us to keep the membership informed and to respond effectively to their needs and suggestions. These activities create a sense of camaraderie and caring that is essential for the union to gain increased legitimacy among its members. In addition to keeping the entire membership informed, we have created new institutional structures to create a more active and dedicated membership. We seek to motivate members and teach them that they are the union and that together we can and do make a difference.

Our internal program manifests itself in our external activities. What are these activities? Our activities start from the fact that we have been working without a contract for almost twenty-two months. Last spring when we refused to surrender our tenure and with it the future of SUNY and the tens of thousands who depend on SUNY for a quality education, the state unilaterally stopped payment into our Benefit Trust Fund. Relating this to Scheuerman's Law, here is a case of the trustees' joining with state negotiators to punish us because we resist their attempts to destroy faculty authority by taking away our tenure.

Because of the state's illegal action -- illegal because, even though a supreme court judge issued an order mandating payment and an administrative law judge ruled in our favor, the state refuses to accept their decisions and has filed appeals -- some sixty-thousand UUPers and their family members are working without dental and optical benefits. Our response was to involve members in activities to let the state know how we feel and to let our members know they can make a difference. We have written tens of thousands of letters and post cards, walked on picket lines, participated in demonstrations, and are currently preparing actions for commencement ceremonies. We are strong and united, and we shall not be moved!

A second focus of our activities is the state budget. On this front, we continue to work with our friends in the legislature on both sides of the aisle. In conjunction with the New York State United Teachers, we have an ever-present cadre of volunteer and professional lobbyists to make our case. Additionally, we have formed coalitions with small businesses in every upstate town where there is a SUNY campus. These business people, mostly Republican, know the value of SUNY to their community and work with us to keep the university alive and well. We also work with other organizations such as NYPIRG, other state unions, and the Preservation of SUNY to realize our mutual goals. Since UUP is a pragmatic rather than an ideological organization, we would also like to work with our Governor and look forward to that happening. Since our budget and contractual struggles began almost three years ago, we are stronger, more vibrant, and more confident of ultimate victory than ever before.

UUP's is one model for responding to activist trustees and presidents. New York is a unique place, thankfully. But our experience can shed some light on how our unions might respond to attack on the faculty by activist trustees and campus presidents. Perhaps what this little application of Scheuerman's Law suggests is that no group has a monopoly on power for very long. Perhaps the lesson we can learn from Scheuerman's Law is that our time and energy would be better spent looking for areas of mutual agreement where we can work together to advance the education of our students and to give taxpayers the best educational return on their investment. When we sit down together, we all benefit from what each gives to the discussion. Let's try it.

Appendix A

MEMORANDUM

Date: July 25, 1995
To: Fellow SUNY Trustees and Chancellor
From: Candace de Russy, Ph.D.
Re: A Personal Vision of SUNY's Future

The following are what I view as the key issues confronting SUNY. I submit them to you in a constructive spirit and with the objective of achieving a more focused discussion at our upcoming retreat.

In the near future I also believe it would be worthwhile to discuss these issues -- as well as your concerns -- with Patricia Woodworth, the Governor's Director of Budget, and Geoffrey Flynn, his education advisor. We should be able to work cooperatively with the Administration to identify cuts and reforms, rather than become swamped in confrontational, special-interest pleading.

Although the challenge before us is daunting, let's maintain our perspective. Despite all protestations, this year SUNY faced a cut of only $36.6 million out of an all-sources base of $5.3 billion (1994-95 adjusted base) -- a less than one percent cut. Clearly, more fiscal savings and programmatic changes can be achieved.

REFOCUS WHAT IS TAUGHT AT SUNY AND HOW

SUNY can no longer be "all things to all people," given the fiscal crisis faced by the state. As a result, we must rethink our mission and refocus our resources. Accordingly, let us:

- Rewrite SUNY's mission to focus on academic excellence, rather than on the unbridled interpretation of "access" described in SUNY 2000.

SUNY's mission is set forth in State Education Law, Section 351. This mission statement was updated by the state legislature in 1985 and has been used -- one might say misused -- to justify an unfocused approach to SUNY operations.

We need to go back to fundamentals. Namely, SUNY exists to provide education of the highest quality to all New Yorkers, but above all to the poor and middle class.

- SUNY admissions standards should be reviewed and, in general, raised.

SUNY entrance requirements can serve to elevate what is expected of high school graduates and restore accountability in our public schools.

By relaxing entrance requirements and creating vast remedial education courses, SUNY has contributed to the decline of public education.

Our Board should ensure that SUNY does not repeat the problems of CUNY, whose standards declined dramatically when it sacrificed quality for unrestricted "access." SUNY can avoid this fate by reasserting high academic standards.

It is false to rebut that high academic standards run counter to "access." Although initially skeptical of reform efforts that focused on tougher standards, Albert Shanker of the American Federation of Teachers concluded, after seeing the results: "Setting higher standards works. When we expect more of students, they rise to our expectations."

To its credit, CUNY has rethought its policies. The CUNY Board of Trustees voted on June 26, 1995 to adopt stricter admission policies.

Our Board would demonstrate vigorous leadership to the state and nation by moving in the same direction, and perhaps even more decisively.

- Refocus which programs are offered at each SUNY campus, because it is not necessary that each campus offer a comprehensive menu.

SUNY's *Application Guidebook* includes a grid that explains which departments (science, music, business, etc.) exist at which campuses. It should prove useful in helping us assess financially wasteful replication within the system.

- Eliminate weak course offerings.

SUNY offers some classes that could not withstand public scrutiny.

Our Board should appoint a committee of eminent scholars to review the course offerings of all 64 campuses and recommend that insubstantial courses be eliminated.

It is expected that campus presidents support this effort to uphold serious courses with intellectual content and standards.

- Rank-order SUNY's 64 campuses as part of a review of possible campus closings and mergers.

The Chancellor and the SUNY chairman agreed to avoid any campus closings for academic year 1995-96. Ultimately, however, we need to consider whether we can sustain 64 campuses.

As a basis for discussions down the road, SUNY should rank- order all campuses based on several criteria, including but not limited to enrollment trends and economic impact.

- Eliminate SUNY graduate programs in fields that are amply covered by private institutions within the state or region, e.g., law, medical, dental, and pharmacy schools.

In its undergraduate institutions and community colleges SUNY serves a valuable role in providing solid opportunities to the middle class and the poor. Our obligation to offer subsidized graduate programs, however, is much less clear.

As a start, we should rethink whether SUNY should be allocating limited tax dollars to graduate programs that (1) are widely available in private colleges and universities, and (2) lead to high-dollar occupations (which means that loans are readily available to students who want to attend private graduate programs in these fields).

We should quantify how much is being spent by SUNY for law, teaching, medicine, pharmacy, and dental schools. Does the state need, for example, a SUNY law school and so many teaching colleges? After all, few would argue that New York faces a shortage of lawyers, law schools of quality, or teachers. Targeting these programs would be controversial, but these resource might be better spent strengthening undergraduate programs and meeting our costcutting obligations.

- Eliminate any English-as-a-Second-Language courses offered by SUNY.

As the late and distinguished SUNY professor, Barry Gross, pointed out in an Op-Ed for the *New York Times* (April 22,995): "Why should students who speak minimal English be admitted to higher education? What other country admits to its universities students who cannot speak the language of instruction? What would a person who does not speak Japanese do at Tokyo University....?"

Such questions should move us to consider the true mission of the academy and the just limits of the burden we place upon taxpayers.

- Make it known in the current UUP contract negotiations that we Trustees favor greater faculty productivity.

Faculty salaries make up a large portion of the SUNY budget.

SUNY professors in general can reasonably be expected to carry a greater teaching load. At present, fully tenured professors teach only a few hours a week although they are paid about two or three times the median income of the local community.

Relatedly, we should assess the role, quality and cost of teaching assistants in SUNY's classrooms. Our students deserve as much contact as possible with an experienced and expert professoriate.

Presently, the Governor's Office of Employee Relations (GOER) and SUNY Central are engaged in negotiations with UUP, the union representing professors. Although GOER, not SUNY, is in charge of these negotiations, we nonetheless should let GOER know our priorities. To this end, we need to be briefed on the status of negotiations and take a more active role.

In addition to tracking more effectively time spent by professors in undergraduate classrooms and the use of graduate assistants for teaching and grading, we should also review current sabbatical practices.

The Pataki administration estimates that raising the student-to-faculty ratio from 19.5 students to 20.5 students would save $18 million annually and that requiring each professor to teach one more hour per week would save $25 million annually. These do not seem like onerous requests.

REDUCE TAXPAYER SUBSIDIES

A key to shoring up SUNY's credibility is finding ways to reduce the taxpayer subsidies for SUNY and related programs. This principally calls for raising tuition further, cutting nonacademic spending, and expanding privatization. Thus we should:

- Raise SUNY tuition further to bring it in line with the average of neighboring states.

Although SUNY trustees raised tuition in June 1995, further increases are needed to reduce taxpayer subsidies and to bring New York in line with neighboring states. The average tuition and fees in the neighboring five states is $5,051, according to the Governor's Division of the Budget. There still is room for further tuition increases.

- Institute a sliding-scale tuition to reduce taxpayer subsidies for the children of well-to-do families.

The Business Council and others have pointed out that SUNY's heavily subsidized tuition not only benefits those who need the financial help, but also the wealthy. As a result, they and others have called for means-tested tuition. The Business Council noted: "While half of all SUNY students come from families with incomes exceeding $60,000 a year, the average taxpayer -- who makes about half as much -- is shouldering more and more of the higher education cost burden."

- Allow SUNY community colleges to raise tuition at the local level without interference from SUNY Central, thus enabling the local communities to reduce local property tax burdens.

In June 1995, the SUNY Trustees adopted a $2,500 cap on community college tuition.

By not granting community college boards the authority to set tuitions at higher levels, that action forces costs to be shifted to local property taxpayers.

The cap should be repealed. Community colleges should be allowed to set tuition at any rate, as long as it is lower than the tuition at SUNY 4-year institutions. Local judgment and market forces are better mechanism for setting community college tuitions at appropriate levels than SUNY mandates.

- Identify state and federal mandates on SUNY that drive up costs or limit our ability to reallocate resources.

The Governor's Office of Regulatory Reform (GORR), headed by Robert King, is reviewing state and federal mandates that drive up costs and/or reduce flexibility.

SUNY should provide a list to GORR of mandates that it would like changed or eliminated.

- Reverse SUNY policies that place restrictions on privatization and work closely with the Lauder commission to identify privatization opportunities that could reduce the tax burden of SUNY.

We need to look very seriously at privatization options throughout the system. Possible targets include security arrangements, mental- health counseling, day-care, quick-printing, health clinics, remedial programs, and career counseling.

As a first step, we should vote to repeal a decades-old SUNY resolution that limits commercial activities on campus. Resolution 66-156 provides that "no authorization be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide for food, laundry, dry cleaning, barber and beautician services and cultural events."

We also should consult with the Lauder commission on privatization set up by Governor Pataki. One campus closure option is to privatize failing or non-core campuses, with due consideration of options for low-income students.

- Review social-service programs offered by SUNY.

SUNY, in addition to educating students, provides a wide array of social services ranging from counseling to day care to family planning. We need to consider whether SUNY is simply trying to do too much.

MORE ACTIVE ROLE IN SELECTION OF CAMPUS PRESIDENTS

- Reassert our proper role in selecting campus presidents.

Our Board has the legal authority to select campus presidents. By tradition, however, Trustees apparently have not significantly participated in these critical decisions. It would seem instead that they have often somewhat perfunctorily approved a single candidate chosen by local campuses.

If we intend to implement a new vision for SUNY, we must take a more active role in the selection of campus presidents, especially at SUNY centers such as the University at Albany.

If my fellow Trustees agree, campuses would be advised of this new approach, wherein several names would be forwarded for our consideration upon vacancy and wherein we would be apprised of search efforts throughout the process.

REVIEW RACE- AND SEX-BASED PREFERENCES

- Review SUNY's affirmative-action programs in light of, one, the recent U.S. Supreme Court decision in Adarand Constructors v. Pena, which newly subjects federal affirmative-action programs to a strict-scrutiny standard, as well as other Supreme Court decisions, and, two, the recent rejections by the California Board of Regents of university race - and sex-based programs.

SUNY's affirmative-action efforts lie in three areas: employment, contracts, and admissions. Clearly it is time for a thorough review.

At a minimum, SUNY legal staff should provide us with a range of reform options for consideration as well as a full briefing on current affirmative-action efforts, particularly any preferential admissions policies.

We should review statistics on admitted students to determine if academic standards have been relaxed for members of protected classes. For example, it would be useful to know for each campus the percentage of students admitted on the basis of pure academic ranking, athletic ability, alumni connections, and diversity considerations.

We SUNY leaders should thus participate in the national reevaluation of divisive and otherwise morally questionable preferential policies. However, we would do far more to advance the cause of social justice by demanding that New York's inner-city children be provided with the basic academic skills and learning needed for entry into SUNY.

I look forward to working with you.

ENDNOTES

1. N. Drescher and I. Polishook, "Perspectives on the Development of Faculty Unions in the United States," in Journal of Tertiary Educational Administration, Vol. 7, No. 1, AITEA, May 1985; "Markets and Managerialism in Higher Education: An Australian Union Perspective," Graham McCullouch, Background Paper for Workshop on Management and Governance of Higher Education Institutions, Joint Educational International and United Nations Education Scientific and Cultural Organization [UNESCO] Conference, Paris, France, March 19-21, 1997.

2. For an analysis of the conditions behind contemporary anti-government ideology, see Private Interests, Public Spending, Balanced Budget Conservatism and the Fiscal Crisis, Sidney Plotkin and William E. Scheuerman.

3. "Newly Appointed Trustees Stir Up Public Colleges," The Chronicle of Higher Education, January 26, 1996, p. A 26.

4. Given the change in the New York State Executive Budget format, it is extremely difficult for the expert as well as the casual reader to identify the magnitude of the Executive's proposed cuts. Prior to 1995, the Executive Budget contained a lengthy description of the proposed spending, detailing the amounts and their implications.

5. "Members of Virginia Boards Are Urged to Become Activists," The Chronicle of Higher Education, March 21, 1997, p. A 35. Trustee DeRussy lays out her vision of curricula reform in a memorandum to SUNY trustees and the chancellor, calling it "A Personal Vision of SUNY's Future." See Appendix A, copy of memorandum.

6. "Newly Appointed Trustees Stir Up Public Colleges," The Chronicle of Higher Education, January 26, 1996, p. A27.

7. The Chronicle of Higher Education, January 26, 1996, p. A27.

8. "Commission Recommends Strengthening College Presidents' Power, The Chronicle of Higher Education, September 13, 1996, p. A43.

9. "Critics Say New Trustees Are Politicizing Presidential Searches." The Chronicle of Higher Education, August 9, 1996, p. A19.

FACULTY, UNIONS, AND MANAGEMENT

F. THE ROLE OF THE UNIVERSITY PRESIDENT IN CONTEMPORARY INSTITUTIONAL GOVERNANCE

Michael Schwartz
President Emeritus and Professor
Kent State University

I come to this conference flying three flags but have been asked to speak to only one of them. I am President Emeritus of a large, Carnegie Research II university with a particularly important history borne of the 1960's and early 70's. In that capacity, I served on the Association of Governing Board's Commission on strengthening the presidency which issued a report, the contents of which have aroused some consternation among some presidents and professors alike (which means either that it has not been read by its detractors or that it has and is so badly written that it is being misunderstood with some regularity). I also come here as a trustee of a very troubled, historically black, university. All of the troubles of that university can be placed squarely on the shoulders of its former presidents, other administrators, almost all of its former trustees, and with some certainty, the Ohio Board of Regents and its staff, and without any doubt whatsoever, the Ohio Legislature and several former governors. All of these "unindicted co-conspirators" have brought Central State University to the brink of a dissolution. I make this point only to say that the idea of finger-pointing by any one of the parties involved in governance of public institutions today at any or all of the other parties with regard to whatever the perceived ills of any institution or of higher education more generally may be pointless, as the amount of blame to be spread about is not in short supply.

While I am at it, I should point out that I also fly the flag of the professoriate, as I currently serve as Trustees' Professor, teaching courses in the foundations of higher education and higher education administration. It is in this role that I have moved from an active administrator to the happy status in which governance has become a spectator sport, and I have become a rather keen observer of it in the last six or seven years. In another life, I was a sociologist who studied deviant behavior in adolescents, and of course that adds to my credentials in the current context, I am certain.

In the course of my remarks today, I wish to address two points. The first of these has to do with some definition of just what university presidents are supposed to do. That is to say, I hope to give some definition to the position and, by implication, to say what presidents should not do or at least not be asked to do. The second point that I wish to address is the more difficult one: it has to do with the idea of "trust" in the governance of contemporary institutions and the way in which the failure of trust may lead to governance structures meant less to govern than to prevent or at least slow any form of change. Involved in this matter is the development of the professional administrator, especially the professional president as a kind of social type, the advent of which is, I suppose, inevitable but still to be regretted, in my view.

If one looks at the contemporary literature on the presidency and its position in the governance of the university, one should find the literature relatively sparse, but some of it quite good nevertheless. Robert Birnbaum, James Fisher, Peter Flawn, Estella Ben Simon, Richard Chait, Clark Kerr and Marian Gade among others, are serious students of the presidency and of governance more generally. It is not too difficult to piece together some relatively acceptable picture of the presidency from their combined work, although professor Chait will dissent, of course, from the first of the points I will make about the role, and he would dissent rather strongly from my position on tenure which I will describe briefly later.

The first of the points is that the president is fundamentally responsible for finding, in the history, traditions, myths, and sagas of the institution, the background in which to place the current hopes and aspirations of the institution's faculty, trustees, and staff. In the course of learning of those hopes and aspirations, both for members of these constituent groups as individuals and for the institution more generally, the president needs to be able to define an otherwise uncertain future. Often this is referred to as having some "vision" of the future. I hesitate to call it that because I have seen some evidence in my life of presidents who have confused vision with hallucination. Whatever one may wish to call it, the president has a singular responsibility for setting an institutional direction and agenda within the confines of the institutional mission. Here, I hasten to say that setting the mission of the institution is not within the president's purview. It is generally the function of the bodies that create the institution initially, say a legislature or religious organization, to establish its mission. The mission creates the boundaries within which presidents ought to fashion some more narrowed, carefully defined vision of the institutional future. Trustees, ultimately need to be the custodians of the institutional mission, acting in the public interest, which is to say, acting in the best interests of those who established and who maintain the institution for the use of the students and the professors. The more narrowed vision is, essentially, the product of the distillation of stakeholder sentiments with the addition of some disciplined presidential imagination in advancing those sentiments.

The discipline of the imagination of the future is made absolutely necessary by the second requirement of the presidential position which is to say, the requirement that the president be able to forge a consensus around the vision or definition of that otherwise uncertain future. This is a process that is unending; it goes on for the duration of the president's tenure. The vision is what the president has to "sell" and the sales pitch never ends. The first constituent group to whom it must be sold is the governing board itself. If a president spends the first six months to a year developing the definition of the future but cannot persuade the governing board of the wisdom of it, the president ought to resign to once. And if that vision has been a reasonably accurate distillation of the views of the professors and staff and if it has been put in reasonably accurate historical and mythological context by the president, and it is still rejected by the governing board, not only should the president resign, but on the way out, he or she ought to warn the professoriate that the gulf between the governing board and them is dangerously wide. It would be a courtesy to do that. However, if the vision does sell to the board, it ought to sell to the faculty, as it comes largely from them in the first place, as it properly should. That ought to make it not difficult for the students and others to accept as well, as the professors now become allied in the definition of the future. Alumni may be another matter because, as some wit has said, "The alumni are people who remember the university as it never was and they do not want it to change." Nevertheless, it is this consensus which the president must have in order to unite contending interest groups on the campus; it is a consensus about a transcending vision which the president must invoke at every opportunity in an attempt to create some unity in an inevitably contentious environment -- an environment in which resources are sorely restricted and limited, and which can decay into a war of all against all. The vision can become the rules of civility for the campus. Otherwise, the university may, as Clark Kerr has observed, become a bunch of contending departments, united only by a common grievance about parking.

Assuming that the president is able to form this vision and is able to forge a consensus around it, the next hurdle is to find and provide the resources, financial and human, needed to drive that vision forward. This means establishing an administration, establishing legislative liaison, developing a long-range plan based on the mission and the narrower vision, and cultivating the alumni and other major donors, and so on. But above all, it means careful attention to the three basic needs of administration in higher education: a) faculty development, b) faculty development, and c) faculty development. No university can be any better than its professors; that is not an article of faith. That is, rather, quite demonstrable, and John Henry Cardinal Newman knew it, and Jaroslav Pelikan has recently reiterated it, and the rise of the research universities in America proves it. The only event that can shake one's faith in this might be the Kennedy-Johnson years in which federal research grant dollars were systematically diverted from the best possible investigators to a more geographically democratized distribution of investigators. Even in that case, the changing face of the academic job market (fewer jobs, and with more of the best-trained Ph.D.'s circulating among institutions previously unable to compete for them) mitigated this effort in some measure.

Following from all of this, the president, and most certainly the governing board, must be able to step away from this process periodically in order to assess the success or failure, and to assess the success or failure of themselves as stewards of the mission and vision. The time does come to determine the efficacy of the vision. Does it need to be changed, updated, abandoned in favor of totally new directions? And then comes the question of the ability of the institution to adapt to change, some of which the institution itself has created. And it is at this very point that contemporary issues of governance emerge. Now the game of "who do you trust?" emerges as academic hardball. If all goes well, perhaps a little tweaking of the vision is in order or other modifications may be made. In any event, nothing in this process of presidenting stays still -- not the vision, not the consensus, not the human or financial resources, not the plan, and most certainly not the evaluation of the work ever stands still. If trustees make an error in presidential selection (and they often do), it is that they assume that the last president fixed something and that since it was fixed we can move on to someone with different skills who can come here and fix something else. I will baldly assert that nothing ever stays fixed on any campus and that to think that some things do stay fixed is to go in search of grief. That search for grief often results in the selection of the next president. Happily, there are enough smart folks in the president business who know that nothing stays fixed so that no matter why a governing board hired them, they know that they have to do the whole job, not just some part of it.

Assuming then, that the presidenting goes well, which is to say that the scenario that I have just described is followed reasonably well, what else does it take to president well? The list is long to be sure, but it is here that I will add only two items.

First, the president must establish a reputation for telling the truth no matter what the quality of the news, and must establish that reputation with everyone. To do any less is to endanger the trust necessary to leadership. It takes very little to breach a trust in the academy; but when people accord the president the right to define their futures for them, which is to say, the right to define the nature of their professional and personal lives and livelihoods, they yield up that right, or should yield it up, only on the basis that they will always be told the truth of things. Setting aside for the moment the arguments about constructivist views of "truth," it is reasonable to expect presidents to publicly defend decisions based on their best understanding of circumstances. It is also reasonable for presidents to go before their constituents and admit to errors and to propose correctives. It should be the case that professors and board members can say quite uniformly about any president that the president says what the president means and the president means what the president says. It is not necessary that all agree with the president; it is only necessary that the president be perceived to be a person of great personal and professional integrity. Every member of the administration must earn the same reputation; presidents need to be shed of those who cannot be trusted to tell the truth. In that sense, the failure of trust will ultimately bring down any administration; at the very least, it will immobilize it.

Aside from truth telling (one of those things we needed to know and which we learned in kindergarten), there is one other characteristic that I would insist upon in the presidential life. The president ought to share the characteristics of those individuals who the president is expected to lead. That is to say most especially that the president ought to share the values, at the very least, of the professoriate, which values include, or should include, the nobility and primacy of teaching as an art form, the need to protect the freedom of those who engage in any of the forms of scholarship as defined most recently by Ernest Boyer, and the need to defend tenure as more than a guarantee of academic freedom, but as a protection against the turning of the institution into a partisan camp which will eliminate the right to dissent. I have written about this at length elsewhere in a discussion of the student movement of the 1960's and early '70's. There are politicians and others who do wish that a certain orthodoxy would be enforced on campuses. Sometimes, that is also true of major donors. There was a recent case of this at Yale, as I recall. Tenure may create some so-called productivity problems and some so-called flexibility problems, but those problems are as nothing compared to the imposition of a political orthodoxy upon the university from the outside which will, as we learned already in the McCarthy era, if not fought early, lead to, not a chilling effect on academic freedom, but rather an outright elimination of it.

While I will support the candidacy of non-academics for presidencies, I could not support the candidacy of those who do not share these fundamental characteristics of academics, and most especially the concern for academic freedom. Here, I wish to say that in the course of the deliberations of the AGB Commission on the presidency, more than one public university president who testified before the Commission wished that tenure would go away. I warn only here that not all academics who become presidents are particular friends of dissent. In fact, the debate over tenure within the Commission ultimately hinged on seeing tenure as related to the matter of dissent and this ultimately overrode serious sentiment in favor of the elimination of tenure as an impediment to necessary flexibility. You will note that the report of the Commission does not take up the matter of the elimination of tenure at all.

This should be an aside, but in the current debate over who will be in control of the governance of colleges and universities, the point becomes central; the faculties are perfectly capable of being their own worst enemies when the discussion of tenure eventuates. What is often called merely "political correctness" is understood as much more than the wish not to offend others through the invention of new language for old things. Political correctness is often seen, and regrettably quite accurately, as the imposition of a system of censorship if not out and out thought control upon unwilling students, staff members, and professors. The horror stories abound with regard to mandatory sensitivity training, speech codes and their enforcement, curricular revisions which go far beyond being culturally inclusionary to the point of being damning of predominant cultures at the same time. Muckraking books by journalists and others on these topics are having serious effects on a public view that begins to see an academic community which has already become a partisan camp brooking no dissent and denying academic freedom to the "incorrect," and demanding conformity to correctness. Stories of male students being abused in women's studies courses, of white students abused in Pan-African studies courses, of white males being denied positions based on gender and race are all too common and all too often true. Couple this with a growing incivility in the academic enterprise itself which had until recently always stayed close to a universal condemnation of the *ad hominem* attack, and it becomes more and more difficult to fend off the parties to the governance structure who wish to assert their authority by sharing less and less of the governance with those who demand freedom but who are reluctant to accord it to others. It is not altogether a mystery that the political right is seeking to redress what it sees as a profound imbalance in the politics of academic institutional life. To the degree that the left is limiting of the right to dissent, I do not object to the right's attempt to redress the balance. But if balance is not the goal but rather the creation of a partisan camp of the right, no purpose will be served, as there is nothing to choose between the authoritarians of the left and the authoritarians of the right. Shared governance can have only one meaning: its purpose is to balance the interests of all in the service of the protection of dissent as the foundational principle of the modern university itself. It is the role of the president to be sure that such a balance is established and maintained. To fail in that regard because the president is trying to protect the resource base, for example, or for any other reason, is a betrayal not only of the presidency but of the institution itself. It is therefore correct to say, in my view, that the single greatest need in the presidency, aside from shared group characteristics and a substantial penchant for truth telling and the personal integrity that this implies, is personal courage. The failure of courage more than anything else is the source of the trouble in which presidents too often find themselves today. The failure to be sure that the professoriate itself is true to the principles of academic freedom is just as reprehensible as the failure to be sure that political forces of a different, perhaps vestigial, orthodoxy do not take over the campus. This failure of courage is every bit as crucial to the development of trust in the office as is the telling of the truth as one knows it.

It is a tragic thing to acknowledge, but truth telling and courage in office have not always been in long supply. And governance structures emerge as defenses against the failure of trust that is the consequence of a short supply of truth and courage. Faculties are especially good at evolving structures in contexts of distrust because the failure of trust is readily translated into "they" do not care about us, our work, our professionalism, or our universities. "They" do not care about our culture. I do not know if the definitive study has been done, but I will venture the hypothesis that there is not a campus with collective bargaining today on which the bargaining movement did not begin with this perceived failure of trust -- with the perceived failure of presidential truth telling and courage.

The AGB Commission report returns time and again to the theme that in too many universities, largely on the public side of things, there is an inflexibility of the governance system that causes the institutions to be less nimble in the face of social and technological change than they need to be. The report has a very modest suggestion: it asks for the reexamination of the existing shared governance structure at each institution to see if it isn't possible to make the decisionmaking process more reactive to a rapidly changing environment. On its face that is not particularly unreasonable. Universities should, from time to time, take stock of their own inefficiencies and failures of effectiveness and take steps to repair them. There very well may be faculty time devoted to consultation on matters best left to administrators. There are matters that belong only to the faculty for decision. There is a need to depoliticize the process of trustee selection and appointment just as there is a need to depoliticize the "correctness" agenda at many institutions. I find little with which to quarrel in any of this. Presidents should be allowed to president and to take risks on behalf of the consensual agenda of the vision. Why not? What could possibly be objectionable about any of this?

It is history. It is experience. It is the failure of trust that makes for a jaundiced eye being cast upon these Commission suggestions. When one finds a governance structure that establishes a faculty senate with some sort of representational voting system by colleges or disciplines, and then finds that the senate establishes standing and *ad hoc* committees to do its work, and then finds that the work of the committees is often sent back for further study or information, and then finds that when the committee report is finally accepted by the senate it still has to be sent out for a vote of the whole faculty for ratification before it can go to the president AS ADVICE, it is fair to conclude that something is awry. Nor is it unfair to conclude that something is awry if the "good old Charlie" phenomenon kicks in as well. That is the situation in which the Senate is about to vote on an item that has the support of about 90 percent of the voting members and good old Charlie stands up and says the proposal will do untold damage to his program in Slavic dance, and one finds that, within seconds, the proposal is voted down and Charlie's program is saved. That may be colleagueship in some quarters, but it is governance by buddy and is just as reprehensible by a faculty as is the failure of truth and courage by a president. And these structures and scenarios do exist; they do continue. They are designed to string out the process, delay decisionmaking, and obstruct the ability of an administration to make rapid decisions in response to rapid change and to obstruct the implementation of those decisions. Such structures exist for a reason. They exist because it is understood that if the process is strung out long enough, and if there are enough check points and delays, sooner or later "we'll catch'em."

Such structures are not the consequence of faculty intractability, irrationality, or ideologically-motivated demands for power. They exist because of an experience, perhaps a history if you like, of lack of trust -- a perceived lack of truth and a failure of courage which constitute a threat to the culture. Governance structures that are designed to delay are often enough the consequence of culture threats and should be understood as such.

Why do strong presidents matter? This is a question of defining the word "strong." If you will agree to define it in terms of truth and courage, as I do, then the need for strong presidents in the governance process becomes self-evident. If you have another definition, we need to talk.

IV. TECHNOLOGY AND COLLECTIVE BARGAINING

A. Technology in Higher Education: Bargaining Quality

B. Teaming up with Technology: How Unions Can Harness the Technology Revolution on Campus

TECHNOLOGY AND COLLECTIVE BARGAINING

A. TECHNOLOGY IN HIGHER EDUCATION: BARGAINING QUALITY

Rachel Hendrickson*
Coordinator of Higher Education Services
National Education Association

There is a monologue taking place on college campuses today, one with two participants. It concerns the uses and ownership of technology and its products in the classroom. It is a monologue that clearly needs to become a dialogue. The monologue goes something like this:

> Professor: I've created a new interactive lesson using the internet and multimedia.
> Institution: That's great, if it's on tape, we'll use it this summer, too.
> Professor: Wait a minute, I developed this, I own it.
> Institution: But we pay for your time.
> Professor: Yeah, but not 24 hours a day. I thought about the project after work.
> Institution: Maybe, but you used our resources.
> Professor: No more than a couple of hours of computer time. The equipment was there already. You didn't have to buy anything new.
> Institution: Copyright law says what you develop is ours.
> Professor: I beg your pardon, I'm covered by the teachers' exception, plus, I'm not a "for hire" employee. My intellectual property remains mine, and I want to be sure that what appears under my name is a quality production.
> Institution: We can use it if we want to. We need it for flexibility in scheduling. We'll consult with our attorneys.
> Professor: You're trying to use my own work to replace me. I'm going to call my union.

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*The positions in this paper are solely those of the author and do not represent policy of the National Education Association.

What follows is the academic equivalent of "Let's settle this outside." Each party is indulging in its own monologue.

Issues of the development, use, and ownership of the educational products of technology in higher education revolve around the classic tension between the private interests of the individual juxtaposed with the community interests of the collective, the institution. Each party clearly recognizes the changing nature of the workplace due to the increasing use of educational technology, but the struggle to bargain that change is complicated by the lack of guideposts for bargaining.

The interests of the individual are varied. For faculty, the interests can roughly be divided into issues of professional integrity and issues pertaining to work life. For a faculty member, first and foremost are those issues of professional integrity and professional identity. There is a section of the United States Copyright Act which defines works made for hire as "those prepared by an employee within the scope of his or her employment, or that are specially ordered or commissioned as part of a limited class of work (such as "audiovisual works" like films and videocassettes), if the creator of the work signs a written agreement to that effect."[1]

It goes against the grain of academic tradition for faculty to consider themselves as "for hire." Their "work" is that of the mind and pays no attention to the hours nor a regular schedule, it is not turned on and off like an assembly line. The "scope" of their work is not fixed nor regimented. The academic tradition lends itself to flexibility, not time clocks. A "work" is finished when a faculty member is convinced that it is of such quality that he/she is willing to put a name on it.

The issue of integrity of the scholarly product extends to the use to which it is put. When a faculty member finishes a scholarly book and it is published, the faculty member knows that the book will go to libraries and be used in classes. The faculty member understands that the information may become dated, but the reader is aware of that through the publication information in the book. The faculty member may, at his/her option and the publisher willing, produce a new edition. The scholarly integrity of the faculty member remains intact.[2] There may be no such assurance in the case of lectures that an institution has taped and either run and rerun for its own purposes or sold to other institutions. Faculty have a concern that they may see themselves espousing outdated scholarship five years after taping a class. Is it any wonder that faculty member wants to retain control over the quality of their product. The faculty member is free to use or display the product, amend it, or withdraw it from the market when it no longer represents his/her best thinking.

Faculty members also are concerned about the impact of technology on their work lives. While administrators see the introduction of new technologies into the classroom as some sort of panacea for increasing enrollment and creating flexibility, faculty members understand the actual effort that must be made to create quality programs for their students. They are concerned about preparation time, adequate technical support and workload. In addition to technical concerns, they worry about being replaced by their own images. Once a class has been developed, what is there to stop a grader or graduate student from replacing a tenure-track faculty member in presenting the class? How many students will an institution decide to stuff into a distance education class? How will a faculty member be able to interact appropriately with all those students? While appropriate compensation is also an issue, money does not, in the long run, substitute for the time it takes to conduct a quality class.

Now, what are the collective or institutional interests? Institutions are genuinely interested in the potential for flexibility they see in the use of the new technologies. As the demographics of the student population changes, institutions must change to meet the needs of the new students.[3] With the "traditional" 18-24 year old student no longer in the majority, institutions feel they can no longer afford to maintain the traditional educational day and schedule. In order to maintain enrollment and provide the sort of access that would attract this changing student mix, institutions need to reach out into the community, have quality education available at all times of the day and week. Technology through distance education appears to respond to this need. Rightly or wrongly, many institutions also believe that distance education will provide tuition revenue for a relatively small investment because of the numbers of students that can be accommodated in each distance education course.

As such, the institution is interested in ensuring that it has full ownership and use of the course and materials produced for its classes.[4] From its perspective, since it paid for the production, it should be able to use and reuse the educational materials to meet its need for flexibility. It assumes that, since it paid for a faculty member's time to produce the materials and, since it paid for the technical resources used in that development, it should own the product. This belief inevitably runs right into conflict with the faculty member's belief that, since it was his/her knowledge and creativity that actually produced the materials, he/she should own them. There is evidence in higher education collective bargaining agreements that the parties have managed to find a common ground by restricting the materials produced to the campus.[5]

The word "quality" has been used throughout this analysis, and that is the word that can create the common ground between faculty and administration, between the private and the collective interests. The Western Cooperative for Educational Telecommunications (WCET) has developed "Principles of Good Practice for Electronically Offered Academic Degree and Certificate Programs."[6] Among other things that the "Principles" cite as providing quality in distance education that are relevant to the subject of this paper are the following:

- The program provides for appropriate real-time or delayed interaction between faculty and students;

- Qualified faculty provide appropriate oversight of the electronically offered program;

- The program is consistent with the institution's role and mission;

- Review and approval processes ensure the appropriateness of the technology being used to meet the program's objectives;

- The program provides faculty support services specifically related to teaching via an electronic system;

- The program provides training for faculty who teach via the use of technology;

- Policies for faculty evaluation include appropriate consideration of teaching and scholarly activities related to electronically offered programs.

While these policies do not address the issue of ownership of distance education (or electronically offered) courses, they do address several faculty concerns.

The parties can use "quality" as the basis for contract negotiations around distance learning and, not incidentally, resolve the intellectual property concern without resorting to appeal to external law. In general, what creates a quality distance education product is careful scripting, planning and production; the use of up-to-date, effective technology, student/faculty and student/student interaction; and currency, that is, up-to-date scholarship. Precisely how does quality in distance education translate in a contract? Following the principles above, it concerns the following areas: faculty development, workload, student contact, support services, evaluation, and an internal quality review process. Using the NEA's Higher Education Contract Analysis System (HECAS), I ran a preliminary search of 505 higher education contracts to see if faculty and administration were bargaining distance education and technology issues in such a fashion as to promote quality while protecting faculty rights.[7] Most of the contracts approached the issue by way of traditional "bread and butter" protections - ex., compensation pegged to class size or specifications around hours and workload. Indeed, specifications on workload and compensation connected with technology and distance education were the most detailed portions of those contracts addressing the technology issues. Because workload and compensation are idiosyncratic, it is not particularly instructive to discuss them in detail in this paper. There were, however, two interesting approaches to compensation for the development of a distance education course through the use of royalties:

> If the instructor who created and/or taught the course is unable or declines to administer the course, the sponsoring department may, by agreement with the Office of Telecourse Programs, recruit another instructor with appropriate expertise to administer the course, but the instructor who created and/ or taught the course shall be paid a royalty of ten (10%) percent of the total tuition received from all students based on the continuing education tuition rate, but not to include course fees..

> The University shall have the right to sell or lease the video tapes of a course. The instructor(s) who created and/or taught the course shall receive a royalty payment of ten (10%) of the gross sale or lease price. *(Western Michigan University, MI)*

The Milwaukee Area Technical College (WI) contract provides for a comprehensive system of payments to the faculty member or employee who developed telecourses for the out-of-state distribution of any such telecourses or related materials.

The WCET "Principles" call for interaction and oversight on the part of qualified faculty. In any lexicon, the term "qualified" implies trained, professional academics guiding the course work. It does not allow for substitution of faculty with graders or graduate assistants. It assumes that faculty hold the premier responsibility for the development and implementation of the program. Likewise the call for "appropriate real-time or delayed interaction between faculty and students" assures both quality in education and faculty will not be replaced by their own images. Negotiations around student contact hours in distance education, whether the students are contacted in an office or classroom or on-line and by e-mail assures programmatic quality and maintenance of faculty jobs.

Several contracts specifically called for the sort of student/faculty interaction cited by WCET. In addition to the Illinois Valley Community College contract cited below, specifications for interaction are in the following contracts:

> C. Teaching Activities: 1. To help bridge the distance between instructor and learner, all Distance Education course instructors are required to have an interaction plan with students on file with the division dean. *(Fox Valley Technical College, WI)*[8]
>
> Section 3.14 Telecourse and PACE Courses: 1. Definition:.... Telecourses combine professionally televised and/or video taped lessons with related textbook readings and assignments. Students are required to complete assignments and mail them to the college. On-campus examinations are also required. Depending upon the course, additional on-campus activities may be required by the individual instructor. Students have contact with their assigned course mentor who is a college faculty member. Contact may be made by telephone, personal visits, orientations, or examination. *(Belleville Area Community College, IL)*
>
> 10. Faculty members teaching telecourses further agree that they will make themselves available by other appropriate means, at times other than the stated office hours, to telecourse students who have difficulty contacting their instructor, such as by returning phone calls to students who contact the department office. *(County College of Morris, NJ)*

> Appendix I Teaching Instructional Television Course: B. Teaching Responsibilities: a. Maintain regular office hours whereby students may either visit or telephone their instructor; b. Evaluate any assigned course projects or papers; c. Administer and grade mid-term and final examination; d. Conduct two general discussion and review sessions at an assigned location for all enrollees. *(Carl Sandburg College, IL)*

> Faculty will be required to spend a minimum of 7 hours in meetings with students in group settings such as orientations, special class sessions, and final exams. In addition, the faculty shall communicate individually with students either verbally or in writing, and meetings will be held at a variety of times to accommodate student needs. *(Cabrillo Community College District, CA)*

Protection of faculty positions was an issue in contracts. Some contracts in the data base approached the issue through guaranteed no-layoffs due to technology:

> a. The purpose of teaching with technologies is to enrich and to increase the availability of the curriculum offerings of the universities of the SSHE. b. The parties agree that the use of such technology shall NOT be used to reduce, elimination or consolidate FACULTY positions within the SSHE. *(Pennsylvania State System, APSCUF, PA)*

> ...The purpose of teaching with technologies is to enrich and to increase the availability of the curriculum offerings of Spoon River College at its various sites. While it is the College's current intention that the new telecommunications program not result in any layoffs of bargaining unit members, the Board pledges to meet all collective bargaining obligations in effect at the time any such layoffs may occur. *(Spoon River College, IL)*

> Article XVII Telecommunications: A. The Telecommunications Education System is an electronic educational network designed to provide an alternative means of instructional delivery to provide educational resources to students in a cost-effective and efficient manner. A Telecommunications Education System shall not cause the layoffs, replacement, displacement, or reduction of any faculty member's work hours. *(Gogebic Community College, MI)*

> F. Voice or image Reproduction: Under no circumstances will audio or videotapes or computer programs be used to reduce the number of teaching positions existing at the college in May, 1988, exclusive of any one-semester only contracts or to deprive any present faculty member of his/her teaching position. *(Middlesex County College, NJ)*

> K. Distance Learning. Reasonable efforts will be made to retain the traditional teacher/student interactive classroom relationship. The Distance Learning program will not be used to effect reductions in force of faculty members. *(Illinois Valley Community College, IL)*

Other contracts took a different approach to the issue by requiring a faculty presence or oversight:

> b. Courses offered by any of the above methods [non-traditional methods] will be assigned an instructor(s). *(Ferris State University, MI)*
>
> Appendix I... 1.2 Faculty Selection. A faculty member must be identified for each course and shall be hired and meet the qualifications as per the current agreement. *(Seattle Community College, WA)*
>
> E. Instructional Technology...5. Each distance learning class will be taught or facilitated by one or more faculty members. *(Clackamas Community College, OR)*
>
> 4. To the extent practicable full-time faculty within the appropriate department will have the responsibility for the content of any credit media courses produced by the College. *(Community College Allegheny County, PA)*

There are provisions for faculty to review the quality of the programs being offered, either through prior approval using various traditional mechanisms or through ongoing review means related to technology:

> New courses to be offered by utilization of technology must have the course approved through the University curriculum process prior to submission to the procedure [above]. *(Pennsylvania State System, PA)*
>
> No credit-bearing course taught by non-traditional methods (television, computer aided instruction, videotape lecture, or any other electronic or other media) will be offered without the approval of the department members involved in teaching in that subject area in consultation with the Department Chair. *(Jackson Community College, MI)*

The Community College of Allegheny County (PA) goes a step further in instituting an approval process for the use of courses developed off the campus:

> All commercially produced credit media courses will be submitted to an Employee in the appropriate academic department at each campus for his/her determination as to whether said materials are appropriate and consistent with any existing course offering he/she is qualified to teach....A credit media course that does not correspond to any existing

> course description in the campus catalogue will be treated as any other new course, to be recommended by the procedures of the regular campus curriculum committee...

Concerning the adequacy of support services for managing the technology of education, Gilbert and Green point to critical issue on campus:

> ...[U]ser support is a key and costly component of the information technology infrastructure. Yet some campuses have opted to cut support services because of general financial pressures. As new, increasingly attractive, educational applications of information technology continue to arrive, the need for training and support services will continue to grow.[9]

Too often, legislatures or boards are willing to make an initial investment in hardware, but very unwilling to continue to upgrade the hardware or software. Yet in today's quick-paced technological development, state of the art rapidly becomes obsolete. While faculty can see their interest in having up-to-date equipment and the technical support to operate and maintain it, what is the administration's interest? Students will arrive on campus used to better equipment at home than what will be available to them at the institution. As more campuses boast about the number of computers available to their students instead of the number of books in their libraries, technological strength will provide a competitive edge in recruitment.

Some contracts in HECAS address the issue of the adequacy of support and maintenance.

> Each university shall review the considerations stated in (1) through (4) below, which may be raised by employee development and use of instructional technology...(1) Recognition of that employee effort spent in the assigned development of instructional technology/distance learning materials and in providing instruction assigned in this manner which is appreciably greater than that associated with a traditional course; (2) Training and development resources available to employees who have been assigned to provide instruction through the use of instructional technology, including distance learning; (3) Provisions for clerical, technical, and library support in conjunction with the assigned use of instructional technology/distance learning...*(Florida State University System, FL)*

The Nebraska State Colleges contract also addresses the issue of support and faculty development:

> The request to teach via interactive distance learning shall be made of a faculty member no less than twelve (12) weeks before the course commences. Faculty members who are assigned to teach courses via

> telecommunications delivery will be provided prior training in the operation of the technical equipment to be used for such courses. Technical assistance in the preparation of materials will be provided....

It is through the approval of courses and materials, through appropriate training, and through the faculty's sense of professionalism and integrity that quality is developed and maintained in distance education. In some cases, the push for quality manifests itself in ownership issues that transcend the purely monetary. One way faculty have found to maintain the integrity of their work is to protect it by a "sunset" provision - that is, that the materials may not be used again or must have limits on their use. This insures currency and, hence, the quality of materials.

> Tapes or other materials developed expressly for distance learning may not be used without the instructor's written permission. *(Minnesota Community College, MN)*

The Morton College (IL) contract provides that any materials developed would be the property of the faculty member, with tapes being available for student use for that semester for additional review. Clackmas Community College (OR) has a more detailed sunset provision:

> Each distance-learning class shall result in faculty receiving appropriate workload credit or overload pay. Additional workload credit or overload pay may also be granted for: a. The preparation of distance-learning course material; and b. The periodic updating of the distance-learning course at regular intervals not to exceed three (3) years.

At Alexandria Technical College (MN), faculty retain the right to erase any tapes. The contract at Middlesex County College (NJ) places a three year limit on the use of any tape. Oakton Community College (IL) provides that the tapes be destroyed within two weeks of the completion of the course.

The most comprehensive statement explicitly linking quality to distance education and tying the individual interests to the community interests comes in the distance education vision statement for Chemeketa Community College (OR):

> We value alternative forms of delivery...as part of the overall mix of learning choices that we provide to students. These delivery methods are no longer peripheral or experimental, but are becoming an integral part of how we deliver education. Alternative delivery is an imperative, not an option, for the College's continued viability. We must increase our flexibility in meeting learning needs because a "lifelong" approach to learning requires more flexible forms of delivery, and because learners want control over their learning environment. All of these teaching methods need collective commitment across the College to

> quality, resources... We recognize that using alternative methods requires new skills and learning; therefore, appropriate support and training must be available to faculty. ...Through all of our delivery methods, we have both the opportunity and the obligation to assure that what we are teaching is current. Distance learning is not just important as a learning modality of the future, but also as an emerging workplace competency.

Of all of the contracts examined, Chemeketa came closest, in its vision statement, to matching the quality criteria of WCET. The contracts in HECAS are exhibiting a maturity in their agreements around workload and compensation from the original attempts to deal with the new technologies on campus. I suggest that it is time to move beyond those areas and aggressively bargain quality in education, defining the roles and interests of the individual and the community, and looking at the future.

ENDNOTES

1. Salomon, Kenneth D. and Michael J. Pierce, "Copyright Law and the Information Superhighway," in Technology and Higher Education, ed. by Linda Enghagen National Education Association. (Washington, DC: 1997), p. 141.

2. "If the instructor who created and/or taught the course deems the continued use of an electronically-purveyed course to be detrimental to his/her personal or professional reputation, he/she may request that the course be reviewed by the Office of Telecourse Programs for either substantial revision or removal from circulation. *(Western Michigan University, MI)*

3. "The purpose of teaching with technologies is to enrich and to increase the availability of the curriculum offerings of the Universities of the SSHE" *(Pennsylvania State System, PA)*; "The parties recognize the increasing development and use of technology, such as videotapes... to support teaching and learning and to enhance the fundamental relationship between employee and student... Furthermore, the parties also recognize that this technology should be used to the maximum mutual benefit of the university and the employee" *(Florida State University System, FL)*; "Expanded student access, not high enrollment concerns, shall drive distance learning course selection/scheduling" *(Elgin Community College, IL)*; "The intent of distance learning, including telecourses, is to provide access for students to instruction and services" *(Minnesota Community Colleges, MN)*; "The college and faculty recognize the increasing use of technology such as telecommunications, video recordings, and computer software to support teaching and learning and to enhance the fundamental relationship between faculty and students. Furthermore, the parties to this agreement also recognize that this technology should be used to the maximum mutual benefit of the college, students, and faculty." *(Clackmas Community College, OR)*.

4. "Video-taped instruction shall remain the property of the College in accordance with Board Policy. The videotaped instruction shall not be used for resale or for subsequent course enrollment without first entering into negotiations with the Association" *(Pratt Community College, KS)*; "All video tapes or films made by the College become its property with the restriction that they may not be sold or used for commercial profit." *(Chemeketa Community College, OR)*.

5. "Any videotapes or audiotapes are made of a distance learning course are for student use, and may not be used for any commercial purpose" *(Oakton Community College, IL)*.

6. WCET's activities are supported by the United States' Department of Education FIPSE. The "Principle" were developed in 1995 and have thus far been endorsed by five of the WICHE states."

7. The search done for this paper was not exhaustive. It highlighted some of those contracts with more extensive sections on distance education and technology. It did not explicitly address the intellectual property rights sections of the contracts.

8. Possibilities for interaction included "a. 1-hour orientation with students (required); b. telephone contact; c. on-campus sessions as needed to assure course competencies; d. test review sessions...or other means of communicating information to students."

9. Gilbert, Steven W., and Kenneth C. Green. "Moving Information Technology into the Classroom" in Technology and Higher Education ed. by Linda Enghagen National Education Association. (Washington, DC: 1997), p. 49.

TECHNOLOGY AND COLLECTIVE BARGAINING

B. TEAMING UP WITH TECHNOLOGY: HOW UNIONS CAN HARNESS THE TECHNOLOGY REVOLUTION ON CAMPUS

Mitchell Vogel, President
University Professionals of Illinois

The American Federation of Teachers Task Force on Technology in Higher Education published a report in January, 1996 entitled "Teaming Up With Technology: How Unions Can Harness the Technology Revolution on Campus." Before I enter into a discussion of the report allow me to mention some underlying principles that motivated the Task Force as they began their work. These principles allowed us, as academic unionists, to suggest mechanisms for the successful implementation and utilization of the new electronic technologies into our classrooms and campuses.

One overarching principle was that we get involved. We get involved, not just as faculty, but as unionists. As long as the decisions about the purchase and utilization of technology on campus are left primarily to management, bad decisions are sure to result. It is the practitioners who best know their needs and the needs of their students and the academy. It is our responsibility to ensure that technology is used in a way that does not shortchange our students or ourselves. Three other principles helped define the "Teaming Up" report by restricting its scope and limiting what it hoped to accomplish. From the very beginning of its work the Task Force agreed that it would not:

1. Itemize and describe the most recent technological innovations being utilized in higher education.

2. Enter into debates about the pedagogical efficacy, academic appropriateness and societal impact of the new electronically driven classroom programs.

3. Evaluate the new electronic technologies any differently than other new academic programs.

The reasons were obvious.

RAPIDITY OF CHANGE

We could not keep up with the rapid development of these new technologies. They are changing at rates far more rapidly than we even anticipated when we published the report. The report quoted one expert, Kenneth Green of Claremont College, as stating, "technological obsolescence is a structural component of technology-driven change." We were forced to think of the new technological innovations as part of the much longer evolution of the educational enterprise.

For example, shortly before we published the "Teaming Up" report, I addressed higher education faculty in Seattle. The discussion focused upon the following concerns - the rapid growth of distance learning courses, televised courses, and e-mail and computer based instruction that could lead to the replacement of faculty. Two years later, I addressed the same group and found that the most pressing concerns of the earlier conference had abated. However, new concerns had arisen.

> •The software and hardware equipment utilized two years earlier were already obsolete and faculty were now concerned about their constantly being retrained. In fact, there were complaints amongst even the most computer literate faculty members that the constant retraining and changing of computer-driven programs was leading to undesirable levels of stress and uncertainty.
>
> •Present concerns focussed upon the possible expansion of these courses into entire masters' degrees and virtual universities being conducted in the distance education mode.
>
> •Instead of worrying about how e-mail was replacing faculty student conferences, faculty were now concerned about how e-mail correspondence was cutting into their office hours.
>
> •At the earlier conference, no one mentioned web pages and the utilization of web pages for courses and correspondence. The large number of web pages for course work has now mushroomed, as the majority of those in attendance stated that they had or soon would have their own web page for their classes.
>
> •Perhaps the most threatening concern expressed by the participants in the second conference dealt with access, a topic hardly raised at the first conference. As Green's prediction began to prove itself, more and more campuses and their faculty and students felt an increasing gap between the more affluent and the less economically fortunate. The financial resources of a less affluent institution get stretched very quickly, if they are constantly attempting to keep up with the latest expensive innovations.

The "Teaming Up" report wisely chose to create a framework for the analysis of new programs as they were developed rather than analyze each new individual program.

THE FOLLY OF DEBATE

Another principle underlying the report dealt with the debate over the issues of the new electronic technologies future. We felt then and we know now. The debate is over. Technological advances have been made and will continue to be made. It is an evolutionary process. They will and have changed the classroom. They will and have changed our libraries. They have changed our work. We can not act as overly critical "luddites" and rely upon our own romantic notions of our own academic upbringing and assume that change will not come. We can not maintain the "good old" colleges and universities in our civilization because the "good old days" don't and probably didn't exist. Our unions must create the mechanisms for the successful implementation of the new technologies, not blindly attack them. We must address questions of pedagogy, finances, protection of faculty rights and access, not blindly stand in the way of technological evolution.

NEED FOR ACADEMIC EVALUATION

The last principle guiding the report dealt with the need to utilize the same methods of analysis and scientific inquiry that we use to evaluate existing academic programs and even personnel. No other profession evaluates itself and its work as much as professors. The skills that we have demonstrated must be used to determine how to harness the new electronic technologies. The scientific and dialectical tools of critical thinking must be used to evaluate these innovations. We can not blindly reject, as some of our faculty would suggest, nor blindly accept, as the rapidly growing class of "techno-preneurs" would request, new programs.

Basically, the "Teaming Up report simply encouraged the same form of academic rigor in accepting and utilizing these new technologies as we do any form of innovation. The report calls for the appropriate questions to be asked and the utilization of the normal faculty tools of intellectual inquiry in developing answers to four basic questions concerning the new technologies.

These four key questions should form the basis for faculty and their unions to address the new technologies.

1. Does the technology make sense educationally? Will it really advance student learning and scholarship?

2. Does the technology make sense financially? Is there a realistic cost/benefit analysis?

3. Will students and faculty all have access to the new technology and know how to use it?

4. Are faculty and staff rights protected?

We suggested five criteria for answering the first question. Its focus was upon distance learning. Of course, these same five criteria can be applied to any new technology or for that matter any new curricular change.

> 1. Does the faculty retain academic responsibility and control over instruction? This includes questions of academic credit and transfer of courses.
>
> 2. Are the faculty appointed and evaluated utilizing the traditional mechanisms or are special hiring policies being utilized? Are part-time, non- tenured faculty relied on for these new technologically enhanced programs?
>
> 3. Are substantial faculty-student and student-student interchanges built into the new programs?
>
> 4. Does the new technologically enhanced course provide a service that the traditional program could not provide? Geographic and physical variables can make these new innovations very practical. Is that what is driving the new technology?
>
> 5. Is there a maximum number of courses that can be taken utilizing distance learning? Whereas the task force saw great value in the utilization of these innovations, we opposed programs, such as Virtual Universities, that relied exclusively on them.

It is interesting to note that these questions could and should be applied to all new educational courses, programs or innovations. We are professional critics. We should be able to apply our skills to our own work.

The second of the four questions is becoming increasingly troubling. Questions of cost are becoming more and more problematic. In many cases, governments, and foundations are supplying start-up funding for the expansion of the electronic technologies. It is very rare, however, that funding is found for the maintenance of the electronic programming. My state, Illinois, supplied $18 million a year for three years for the development of distance learning programs. We are now hearing some college presidents asking for more funding in order to keep their programs going. In a least one case, a program was abandoned because the upkeep was too expensive. The Vice-President for Academic Affairs of the University of Illinois lamented that the new electronic technologies would not save money for Illinois' institutions during her lifetime. It is important that both short and long-term funding be considered when these new programs are analyzed.

The third question deals with the concerns expressed by faculty at the Seattle conferences and elsewhere. Access! It is only logical that as education becomes more expensive, the poorer institutions will have less access.

With all the discussion concerning the new technologies and all the publicity concerning virtual universities, distance learning and web pages, we should not lose track of the fact that even today the majority of higher education students do not own their own computer, and that large numbers of faculty do not own a computer, or do not know how to utilize programs dealing with electronic teaching or communications. Programs of financial and educational assistance must be implemented before we can claim to offer equal education.

The fourth question deals with the protection of faculty and staff rights. The AFT will continue its concern with this question by publishing regularly a compendium of faculty contracts and negotiated protections. It is important that maintain the same standards of professional negotiations on questions of electronically-assisted work that we have utilized with our traditional assignments. These include class size limitations, extra preparation time for special assignments, control over grading responsibilities, and special salary incentives.

Unions should provide access to the most recent legal interpretations relating to copyrightable materials. The rights of faculty to protect their creative work is the same in cyberspace as in the more traditional publishing modes. Unfortunately, the means to protect those rights are not the same. Supervision of the means of distribution in cyberspace is far more difficult. Hardcopy books provide a tangible, physical form of evidence that entered as evidence to protect the creative work of our faculty. It is far more difficult through e-mail courses and correspondence.

Since we wrote the report, it is my feeling that we should have expanded this fourth question to cover the rights of the citizenry as well. In many states, including Illinois, all new academic programs receive some form of approval from the state. In the case of a private institution, the approval criteria is very limited and focuses upon questions of the institution's financial and academic integrity. In other words, does the private institution have the resources to deliver what is promised in the academic programs prospectus. States have historically denied approval to many "fly-by-night" mail order degree programs. Now we have the interesting question, Can a state deny approval or expansion of a private institution's courses and degree programs to its residents, if the course originates in another state or country and the method of delivery is totally in cyberspace? This and other questions relating to integrity are becoming more and more problematic.

As you can see our report simply suggested asking questions. We felt that was our role as faculty. We felt that was our role as academic unionists. The report has already served as a blueprint for negotiating some contracts. The AFT will now continuously provide updated contract language to its affiliates.

Unfortunately, others, primarily politicians and "techno-preneurs," have criticized the report for being negative and against progress. One critic of the report, James Mingle, Executive Director of the State Higher Education Officers Organization, stated those who follow this report will "choose the status quo rather than working to make their institution a more competitive and viable entity in the education marketplace. ...If they come to block these developments, it will likely lessen the competitive position of the institution and give encouragement to those who believe that we need whole new institutions, structures, and financing systems to break the control of 'recalcitrant' faculty."[1]

The Chairman of the Illinois Board of Higher Education, Arthur Quern, in response to questions raised by the report stated," We do have some regulatory issues. I only hope that we look beyond the regulatory issues as a higher education community and see the opportunities implicit in this... we have some regulatory misfits between what we have in statute and what the opportunities of distance learning technology offer."[2]

Faculty being criticized and ridiculed for asking questions is an age-old condition. We must be prepared to continue to ask these questions over and over again. The benefits of the new technologies are obvious and in some cases already proven. However, the impact of blind acceptance of the new programs can be as disastrous to the academy as were the earlier assaults upon academic freedom. The impact upon access can be as harmful to our society's well-being as segregated classrooms. The impact upon our campuses' budgets can be as expensive as earlier examples of deficit financing. The impact upon the new technologies will also be limited if the appropriate systems of faculty evaluation are not utilized.

These new technologies offer much to the academy. We must be prepared to utilize them and utilize appropriately. It is our hope that the "Teaming Up" report and its subsequent updates will allow us to "Harness the Technology Revolution on Campus."

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1. Teaming Up With Technology: How Unions Can Harness the Technology Revolution on Campus. Report of the Task Force on Technology in Higher Education. Washington, D.C.: NEA National Center for Technology in Higher Education, 1996.

2. The Higher Education Program and Policy Council, American Federation of Teachers, Washington DC, January 1996.

3. Technology Issues: A Survey of Negotiations. Higher Education Department. American Federation of Teachers, Washington DC, January, 1996.

ENDNOTES

1. James Mingle, Executive Director, State Higher Education Executive Officers, correspondence to The Chronicle of Higher Education. Denver, Colorado, January 11, 1996.

2. Arthur Quern, Chairman, Illinois Board of Higher Education. Public remarkls at meeting of May 17, 1996, Chicago, Illinois.

V. FISCAL PROBLEMS IN HIGHER EDUCATION

A. The Continuing Fiscal Crisis in Higher Education

B. The Mutation of Higher Education and Reconfiguration of the Faculty and Their Roles

FISCAL PROBLEMS IN HIGHER EDUCATION

A. THE CONTINUING FISCAL CRISIS IN HIGHER EDUCATION

Richard F. Rothbard
Vice Chancellor for Budget and Finance
The City University of New York

While it is certainly an honor to be asked to make a presentation today, and to share this panel with such distinguished colleagues, it is certainly no pleasure to have to address, yet again, the subject of the fiscal crisis in higher education.

When I last made a presentation at this conference, in 1993, the title of the panel was, "Working Our Way Out of Fiscal Stress." I suggested in my remarks at the time that a more appropriate title might have been, "Working Our Way Through Fiscal Stress," based upon my proposition back then that the conditions that fueled the stress were apt to prevail for the foreseeable future.

Well, here we are four years later and, unfortunately, I seem to have been proven right so far. The panel topic this year is, "The Continuing Fiscal Crisis in Higher Education." The conference organizers now seem to recognize that recent experience has not been an aberration, but a new reality. Yet, even this title, I believe is in need of some modification. "Continuing," suggests that while a series of troublesome events has brought us to where we are today, the future need not necessarily be as bleak. Let me suggest that the more appropriate word would be "Continuous." Although I am no William Safire, "Continuous" to me reflects better the constant, unbroken assault on support of higher education, and its probable continuation into the future. I say "probable" rather than "inevitable" because even after twenty three years in this business, I still maintain a spark of optimism, and still believe that we can change the course of future events.

I would like to begin my remarks by posing the following question: Will the 1990's be the Next Millennium's "Good Old Days?" How many of you think the answer to that question is yes? Congratulations, you have passed through denial and are now ready to deal with recovery. For the rest of you, do not worry, I am not here to offer a twelve-step program, merely some observations that I hope will be thought provoking.

Observation No. 1. I inevitably begin any discussion of higher education's funding crisis with the subject of tuition. So I will lead with that, as I have in the past. If life is like a box of chocolates, then higher education -- especially public higher education -- is a lot like a candy bar: peel back the wrapper and you get a whiff of something that evokes warm and fuzzy memories of earlier times, but the product itself has shrunk in size and grown in cost.

Take the case of The City University of New York (CUNY). At CUNY senior colleges, students now support, through tuition charges, 43 percent of the annual cost of operations. (That number would approach 50 percent under current budget proposals). That contrasts with 19 percent just seven years ago. This rapid shifting of costs away from the public and onto the individual is also evident in the fact that in 1989-90 New York ranked 34th nationally in tuition and fees at four-year public colleges and universities; but by 1995-96 New York came in at number 11. Likewise, in 1989-90, New York was charging 82 percent of the national average tuition. In 1995-96, it was up to 130 percent of the national average.

At the two-year colleges, the figures are even more striking. At CUNY, tuition revenue is, and has been for some time, the single largest source of annual operating funds, surpassing state aid and far outstripping city support. Statewide, New York has always ranked high in average community college tuition and fees -- sixth nationally in 1989-90. Anyone care to guess what New York's ranking was in 1995-96? Number one. At 195 percent of the national average. Quite a distinction for institutions serving some of the poorest students in the country.

One of the most troubling features of the steady increases in tuition rates is that although many institutions are charging more, they are providing less. This is because tuition increases are supplanting, rather than supplementing public dollars. And in many cases those tuition increases are only partially offsetting state or other tax-levy assistance.

For 1997, New York ranks 43rd in higher education share of total state appropriations. And for the two-year period, 1994-95 to 1996-97, New York posted the largest decline in state support for higher education at 10 percent. Is it any wonder, then, that students have fewer choices of class sections, see adjuncts as much as, or more than full-time faculty, and take longer to graduate?

Is this the proverbial double whammy? Paying more and getting less? Actually, no -- it is a *triple* whammy because of a new and potentially devastating phenomenon, the reduction in student financial aid. Again I will use New York to illustrate. For the second year running, the state's Tuition Assistance Program faces massive cuts. If implemented, the effect at CUNY would be to render ineligible nearly 20 percent of the students currently receiving awards, and to reduce the awards of every one of the remaining recipients. In total, CUNY would lose half its financial aid dollars from the program.

For several years a debate has raged in higher education over the competing concepts of low tuition versus high tuition/high aid. The theory underlying the second concept is that well-to-do students and their families should not be subsidized at public expense for higher education, so tuition ought to be set high. To address the issue of access for economically disadvantaged students, the theory goes, maintain substantial financial aid programs. This may sound wonderful theory, but as New York is beginning to demonstrate, the likely path that states will tread is high tuition/low aid, the worst of both worlds. What is more, New York and most other states do very little to address the needs of part-time students, who are largely minority and concentrated in urban areas, reserving their largess for the more "traditional" student through programs that benefit full-time students.

This is occurring, at least partly, because higher education is no longer perceived so much as a public good as a private benefit, producing a clear payoff for the individual degree recipient, but not so tangible a result for society at large. That being the case, it makes perfect sense for the person who benefits the most to pay the most. Politicians, and the public, we have learned, want tax dollars spent in ways that produce more immediate and more measurable results. For the politicians this means, for example, public works delivered to a locality. This provides a great photo op for the next newsletter, conveniently timed right before an election. For the public it means everything from tax cuts to cops on the beat. Not that these things are without merit, but one gets the growing impression that higher education has been the one area sacrificed on the altar of these shifting public demands.

Observation No. 2. Growing concern by the public over the issue of crime has had a direct and negative effect on higher education. There has been a perception in the United States that there has been a steady and continuing increase in crime rate and a resulting fear of victimization. The response has been the most massive build-up in prison construction and other criminal justice activities in history. According to the Justice Policy Institute in Washington, D.C., America has imprisoned more people per capita than any other industrialized nation in the world. This, in turn, has led to a dramatic increase in prison construction by the states. Between 1980 and 1996, the prison population more than tripled from 500,000 to 1.6 million. The number of people under some form of correctional supervision surpassed five million at the end of 1994. That is 2.7 percent of the adult population. It is no wonder that five states have corrections budgets in excess of $1 billion.

Yet crime rates in most categories have been consistently steady or even down in some cases. And while the fear of most Americans is of violent crime, 84 percent of the increase in state and federal prison admissions since 1980 was accounted by nonviolent offenders.

In its February, 1997 report, "From Classrooms to Cell Blocks: A National Perspective," the Justice Policy Institute seeks to examine the impact that criminal justice spending is having on higher education. The findings are sobering. Let me first share with you some of the report's statistics:

- The average cost of building a new prison cell is $54,000;

- The real cost of building a new prison cell, including debt service, is $100,000;

- Total capital construction spending in 1995 in corrections was $2 billion;

- The average annual operating cost of a prison bed is $22-25,000;

- The average cost of incarcerating an elderly state inmate is $69,000; and

- Estimated annual "off-budget" incarceration expenditures are $8 billion (child foster care, lost tax revenues, public health costs, etc.).

The report concludes that higher education disinvestment is being used to fund this massive buildup in corrections based upon the following findings:

- Throughout the 1980's state spending for corrections increased 95 percent, while spending higher education decreased 6 percent;

- From to 1993, state corrections spending increased 1200 percent, while state expenditures for higher education increased only 419 percent;

- Between 1990 and 1994, only seven states increased higher education spending as a proportion of total state spending, but thirty six states increased the share of spending for corrections;

- In the 1980's, states increased spending for prison construction at over two times the rate of the spending for college construction;

- In 1995, correction expenditures from the sale of bonds were expected to surpass higher education bond expenditures for the first time in history; and

- Over the most recent two available years, 1994 and 1995, state bond funds allotted to higher education decreased by $954 million, whereas state bond expenditures for corrections increased by an almost identical amount, $926 million.

Observation No. 3 The future of the American economy, and individual success, we are reminded in study after study, will depend on at least some level of college education in the next century. The so-called "information age" is upon us. Achievement in a United States economy that has transferred its manufacturing base overseas will depend less on producing things, than on managing the synthesis and movement of the "O's" and "1's" that make up digital information. Unless you are George Bush, you know that even a grocery store clerk has to be adept with bar code scanners, wireless inventory heads, check-out computers, and point-of-sale credit/debit card readers. At the same time, business leaders increasingly tell us that they need workers whose capabilities extend well beyond the technical, to the capacity to analyze problems and offer solutions (ironically, these are frequently the same business leaders who champion the tax cuts that negatively impact higher education). From the perspective of the individual, the ability to adapt and adjust are critical, given predictions that people may change careers seven or more times in their working lives.

We know statistically and intuitively the interdependence of the economy and the academy. The U.S. Department of Commerce estimates that nearly 25 jobs are created in New York for each $1 million of expenditure in the local economy. By that measure, CUNY, in addition to its traditional role of preparing students for the workforce, is directly responsible for the creation of over 320,000 jobs as a result of its spending.

We also know that a full-time worker with a bachelor's degree earns about 50 percent more in a year than someone with a high school diploma. That translates into more discretionary spending to bolster the economy, more taxes paid to federal, state, and local government, and less dependence costly public services.

Observation No. 4. Students continue to seek out higher education opportunities in large numbers. Students are voting with their feet, recognizing the importance of higher education to themselves and their families. Enrollment remains high, depressed only when budgetary or related circumstances force students to vote instead with their pocketbooks to drop out, stop out, or opt out. At City University, we were well on our way to achieving our master plan goal of 226,000 students until we were rocked both by a hefty tuition increase and financial aid cuts two years ago.

At the State University of New York, the percentage of first-time, full-time high school graduates per hundred enrolling went from 24.9 percent in 1970 to 36.5 percent in 1996.

A just completed Student Experience Survey at CUNY compared student attitudes today with those from 1989 on a variety of university-related topics. Not surprising is that results show a student body that is more non-English speaking, more independent of parents, more likely parents themselves, deeper in poverty, and more working full- or part-time.

They find it increasingly difficult to enroll in needed courses than their 1989 counterparts, and although they are utilizing various college services more, satisfied with many of them such as career/vocational guidance. Yet satisfaction with several services, including, would you believe it, cafeteria food service, are up dramatically.

(I hope that this is the result in improved quality on campus and not poorer nutritional opportunities at home).

Interestingly, students feel safer on campus than they do in their own neighborhoods, and feel little racial tension on campus. Not surprisingly, price was an overwhelming factor in students' decision to attend CUNY, making our students especially at risk when tuition is increased or financial aid is cut.

CONCLUSION

Faced with this onslaught, what has been the response of higher education? For the most part, we have been circling the wagons. Reluctant to acknowledge that the problem is long-term and that it may be in some measure the result of something we have done or have not done, we have chosen in too many cases to insist on business as usual and to demand unconditional love and trust from the public.

Yes, we have redefined missions, yes we have closed programs, yes we have imposed higher standards, but these actions have not managed to alter the current course much. So where do we go from here? What do the powers-that-be want from us? To spend even less? To educate even fewer? To become something entirely different? Or to just go away? I do not know the answer. The fact that such questions can be posed is frightening enough, though.

In the 1980's, various United States industries, like steel and automobile manufacturers, were almost driven out of business by foreign competition that was more responsive to customer needs and more efficient in production. Rather than shrivel up and die, they decided to learn to adapt and today those industries and others have won business back.

I do not mean to suggest that what we need is an industrial model or assembly-line higher education. I do mean to suggest that we should not resign ourselves to our current circumstances. We can succeed if we redefine success and remain open to opportunities. This may mean changing the relationship of management and labor, when and where services are delivered, pricing mechanisms, how we procure goods and services, who we partner with, the role of technology, and input and output measures.

It took decades for us to get to where we are today. It is going to take some time to get to where we want and need to be.

FISCAL PROBLEMS IN HIGHER EDUCATION

B. THE MUTATION OF HIGHER EDUCATION AND RECONFIGURATION OF THE FACULTY AND THEIR ROLES

Jack H. Schuster
Professor of Education and Public Policy
Claremont Graduate University

On the occasion of this Silver Anniversary Conference of the National Center for the Study of Collective Bargaining in Higher Education and the Professions, it is my intention to review developments during this span of time that have most affected the American faculty and to suggest some of the implications of these developments for academic collective bargaining and, more generally, for higher education.

It is worth noting that academic collective bargaining was still an embryonic, though dynamic, feature of higher education in the early 1970s when this Center was founded, and the Center has served crucial data-keeping, clearinghouse, and policy-relevant functions ever since. Indeed, on a more personal note, when I began my dissertation research in 1974, on the topic of the effects of collective bargaining on academic decision making, the Center had begun to emerge as an important -- indeed, unique -- resource. And for the quarter century that has elapsed, the Center has continued to serve as a leading source of information and analysis concerning a phenomenon that directly affects a quarter of the full-time faculty in the United States.

This essay has two basic premises. First is the centrality of the faculty to the higher education enterprise. It is axiomatic that, as Jerome Komisar has written, "All that is accomplished by the Academy is a product of the competence, enthusiasm, and energy of the faculty.[1] Others, from staff to trustees, contribute indispensably to higher education, but the principal missions for which the institutions themselves exist -- the triad of teaching, research/scholarship and service -- are the fundamental responsibility of the faculty.

The second premise is that the academic profession is at greater risk today, given its very uncertain future, than at any time in decades. Indeed, the case can be made that the very future of the university, in its traditional organization and role, is in considerable doubt.

Thus we must ask: Are we witnessing the beginning of the end of higher education as we have known it, as well as the possible dismantling of the traditional professoriate? Among the more riveting prognostications are those of my colleague, Peter F. Drucker: "Thirty years from now the big university campuses will be relics. Universities won't survive. It's as large a change as when we first got the printed book.... Already we are beginning to deliver more lectures and classes off campus via satellite or two-way video at a fraction of the cost. The college won't survive as a residential institution. Today's buildings are hopelessly unsuited and totally unneeded."[2] Or consider Columbia Professor Eli Noam's bleak forecast: "This system of higher education remained remarkably stable for over 2500 years. Now, however, it is in the process of breaking down. The reason is not primarily technological; technology simply enables change to occur. The fundamental reason is that today's production and distribution of information are undermining the traditional flow of information and with it the university structure, making it ready to collapse in slow motion once alternatives to its function become possible."[3]

Contemplating such provocative language, a skeptic might counter: Such suggestions are hyperbolic and unduly alarmist; as any student of the history of higher education -- in the US or throughout the Western world -- must appreciate, universities have demonstrated over the centuries that they comprise the most resilient of society's institutions.[4] To be sure, universities have a remarkable, even amazing, capacity to adapt chameleon-like to all manner of environments. They endure -- the ultimate organizational survivors. And yet it is inarguable that the environment for higher education is now in the midst of substantial changes; however, debatable the outcome may be, the forces which I shall describe will have far-reaching ramifications for the nature of academic work and its practitioners. This leads to my four objectives:

> First, to provide an overview of how higher education has changed during this past quarter century, as viewed from a faculty perspective.
>
> Second, to describe how the faculty itself is changing, with an emphasis on the demographic transformation that is now underway.
>
> Third, to outline what these developments signify in the foreseeable future for higher education and its faculty and for academic collective bargaining.
>
> Fourth and finally, I will presume to suggest a strategy -- perhaps more accurately a mindset -- for responding to this problematic future with a view to preserving the essential values of the higher education system in the U.S.

CONTEXT: HIGHER EDUCATION IN TRANSFORMATION

Since its inception higher education has been in continuous flux; change, as is often observed, is the only constant. Yet change is sometimes more gradual, sometimes more accelerated. I suggest here that a number of indicators, some not readily susceptible to measurement depict an accelerating rate of change in higher education. There are so may faculty members (no less than a million if all faculty categories are included), and they serve in so many varying capacities in their "small and different" worlds of institutional types and academic fields, that generalizations about "the faculty" are hard to come by.[5] However, from the faculty's vantage point, several developments underscore the proposition that for the faculty this has not been the best of times. Consider the following array of factors, all interrelated, which, from the perspective of many faculty members, now presses upon them and threatens -- or has already disrupted -- values deemed by many faculty members to be crucial to academic life:[6]

- The assessment movement, launched with vigor during the previous decade, continues to gain momentum and signals to the faculty that they are to be held more strictly accountable for what they do and for the results of their efforts.

- The current academic labor market -- a strong buyers' market for two decades in most fields -- continues to constrain access for would-be faculty and to limit mobility for existing faculty.

- Tenure, a virtually unassailable centerpiece of academic practice for decades, having readily withstood the scrutiny that followed the turbulent 1960s and financial squeeze of the early 1970s, has recently come under renewed attack. The prospect looms that one state legislature or governing board may "break the ice" by deciding to strike tenure a lethal blow, thereby triggering something of a domino effect.[7] Thus tenure may be considerably altered, perhaps surviving in current form at a relatively small number of independent institutions.

- Expectations made of the faculty, by most accounts, have risen steadily, as institutions and their political overseers stress "productivity." These demands are abetted by the prevailing buyers' market that enables institutions to non-renew non-tenured faculty with the reasonable assurance that the departed can readily be replaced with new prospects eager to please.

- Institutions of higher education, anxious to preserve flexibility amidst the uncertainties of a rapidly changing environment and driven to be ever more cost-conscious, have resorted increasingly to making non-tenure track appointments; as a consequence, the number of part-time and off-ladder full-time appointments appears to be expanding rapidly relative to "traditional" full-time, tenured/tenurable appointments.

•Faculty compensation, which had increased steadily in terms of real (adjusted) salaries throughout the previous decade, in 1990-91 suffered its first decline in nine years and has hovered near or below the "break-even point" for the first seven years of this decade.[8]

•While reliable data about the faculty role in governance are scarce, particularly concerning whether the principle of "shared governance" is being eroded, anecdotal evidence abounds about "top-down management" and about institutional decisionmaking leading to strategic redirections that relegate the faculty to a more peripheral role.

On top of these developments, the faculty has not fared well in the estimation of the public and policymakers whose opinions about higher education are consequential.[9] The perception appears to be widely shared among them that many faculty members lead privileged, protected lives often pursing agendas incongruent with students' needs and distressingly out of touch with the "real world." In sum, the faculty of the 1990s have become more and more accustomed to hearing themselves characterized as a part of the problem -- a central feature of the academy that needs to be "fixed" if higher education is to maintain viability (and market share) in the coming era.

Threading through all of these developments is the scarcity of resources essential to meeting higher education's needs. This reality, combined with the widespread expectation that higher education's ability to compete with other sectors for support (from K-12 schools to health care to corrections) is likely to weaken further, has prompted a dual strategy that has been adopted widely -- and not surprisingly -- by higher education administrators and governing boards. It is to contain costs and to maintain as much organizational flexibility as possible in an era of growing uncertainties, volatile student interests, and the spectre of technologies that will, without doubt, revolutionize how much of the teaching-learning process takes place. These strategies are having a powerful effect in reconfiguring the nature of faculty appointments and, accordingly, academic careers, and are reshaping the environment in which higher education teaching and research take place.

A NEW GENERATION OF FACULTY

The pressures that are reshaping colleges and universities are inseparably linked to important changes in who constitutes the faculty. I will focus here on some basic changes in faculty demographics.[10] The following figures are drawn from an analysis, undertaken with colleagues, of the 1993 National Study of Postsecondary Education (NSOPF-93), sponsored by the U.S. Department of Education's National Center for Educational Statistics; it is the most extensive national survey of faculty --

generating more than 25,000 usable responses -- that has been conducted in the past quarter century.

Before describing some of the changes, it is important to establish a few basic points about our method. First, our analysis, undertaken initially for the National Center for Education Statistics, centers on comparison between new and more experienced full-time faculty members. My colleagues and I defined the new cohort as full-time faculty with seven or fewer years of full-time faculty experience. The senior cohort, correspondingly, had eight or more years of full-time faculty experience. In order to ensure that we were comparing "regular" faculty members, we eliminated from the NSOPF database those individuals who had faculty status but who were not primarily teaching faculty, researchers with faculty status, or academic affairs administrators with faculty status. Accordingly, for purposes of our inquiry, we removed from the total weighted sample of about 515,000 full-time faculty persons who had faculty status but who were not substantially engaged in traditional faculty work. Numbering approximately 83,000, they included clinicians, technicians, and librarians, counselors, and administrators (for instance, student affairs personnel) who had been accorded faculty status -- often via a collective bargaining agreement. Also, we did not include part-time faculty in our analysis. Even though they constitute an increasingly important presence in higher education -- comprising approximately 42 or 43 percent of all faculty by head count -- we chose to focus on full-time faculty.

Among our most important findings is that the new cohort of faculty is very substantial in size, considerably larger than my colleagues and I think is commonly assumed. Put another way, the contemporary academic labor market presents simultaneously two strikingly different pictures. On the one hand, a strong "Buyers market" has prevailed in most academic fields for more than two decades (as noted earlier); the supply of would-be faculty routinely exceeds the demand for them, often by large margins. This painfully familiar phenomenon has lead to the widespread impression that the academic job market is practically gridlocked. Indeed, that is one reality. But a parallel reality co-exists: the porous nature of the labor market. In fact, there is a steady infusion of new faculty. In all, fully one-third (33.5 percent) of the full-time faculty have seven or fewer years of full-time teaching experience (as distinguished from their more senior colleagues).[11] They thereby comprise a burgeoning new cohort of faculty.

For purposes of our analysis, it is the size of this new cohort -- about 172,00 full-time faculty members -- that is very important because their size establishes that their distinctive characteristics will have a large impact in the future as they, themselves, move into more senior roles.[12]

The most striking differences between the two faculty cohorts are evident in their contrasting demographics. Only a few highlights can be presented here, but these data serve to demonstrate that members of the new faculty cohort are indeed very different from their more senior colleagues. Consider three variables:

	Characteristic	Cohort
Women	40.7	27.9
Racial Minority	16.6	11.0
Nativity: Non-U.S. Born	17.0	11.3

Combining these three characteristics underscores a further contrast. The modal U.S. faculty member, over the historic sweep of years, was a U.S.-born white male. But that has now changed. While these three characteristics, taken together, account for 59.5 percent of the senior cohort, they describe only 43.4 percent of the new faculty cohort. In other words, only about two in five recently hired full-time faculty members conform to the age-old prototype. This is a dramatic indicator of how quickly the demographic characteristics are changing in the direction of a much richer mix of faculty.

If we introduce a fourth variable -- teaching in a liberal arts field -- the distance between the two cohorts widens further. This is a consequence of the increasing proportion of faculty appointments that are being made outside of traditional liberal arts fields: 44.5 percent of the senior cohort hold such appointments in contrast to over half (50.6 percent) of the new cohort whose appointments are outside liberal arts. Factoring in this fourth variable reveals that 33.8 percent of the senior cohort, but only 20.6 percent of the new cohort, are native-born white males whose academic "home" is in a liberal arts field. Think about it. Only one of five members of the new cohort of faculty are described by these combined characteristics. This represents an emphatic departure from historic norms.

Among the scores of items in the NSOPF-93 survey that my colleagues and I analyzed, perhaps the other most consequential finding, apart from the demographic data, is seen in the changing nature of academic appointments. Specifically, 84.2 percent of the senior cohort of faculty held tenured or tenurable positions. (Recall that our analysis was confined only to full-timers.) But, only 67.2 percent of the new cohort occupy tenured/tenurable positions. This move toward contingent employment signifies a shift -- some would say an alarming shift -- toward a more transient, more "casual," academic workforce. This has huge implications for academic work and academic careers, not to mention the subtle effects of a resulting relationship in which the institution, by definition, feels less loyalty towards that sizable segment of its faculty and, in turn, those faculty members, naturally, can be expected to feel correspondingly less loyalty toward their employing institution.[13]

A third finding merits mention. The NSOPF questionnaire asked faculty members how they allocated their time among such activities as teaching, research, advising, administration, and service. The survey also asked how they preferred to spend their time. Our finding is that faculty members in all categories we examined -- by institutional type, by broad academic field, for both genders, and for both the new and senior faculty cohorts -- indicated that they would prefer to reallocate some of their time from teaching to research. The amount of time they would like to reallocate is not large -- it tends to be an hour or so per week -- but the pattern is unmistakable.

This result may be disturbing to reformers, inside and outside the academy, who maintain -- not without reason -- that the teaching mission has been neglected on the whole and that the reward structure for faculty fails to provide adequate recognition for effective teaching. It is true that the questionnaire does not delineate among the respondents' reasons for preferring less teaching and more research -- as among, say, the need to publish more for survival or promotion purposes or to provide relief from onerous class sizes or because of a genuine affection for research. It is also the case that the data are now five years old and that the persistent pressures on higher education to upgrade the quality of undergraduate education may five years later be having a more obvious effect on institutional priorities. Nevertheless, the penchant for trading off teaching is evident.

There are numerous other points of comparison and contrast that could be made between the two faculty cohorts, but the most consequential findings are perhaps those to which I have just referred.

THE SIGNIFICANCE OF CHANGES IN THE ACADEMY AND FOR THE FACULTY

What do these developments mean for higher education and its faculty and more particularly for collective bargaining in the foreseeable future? The large forces now visible that are reshaping higher education (some of which were touched on at the outset of this essay) point to no less than a revolution in the making, a revolution that will transform higher education. This transformation will be driven by a number of forces already clearly in evidence, among them:

(1) an even more intensive competition for scarce resources from other sectors (as previously noted), thereby further squeezing higher education financially;

(2) the exploding technological revolution, of which we are witnessing only the leading edge in terms of its impact on higher education, making campus-free "virtual universities" already a reality;

(3) the increasingly pervasive influence of market forces which, among other impacts, have substantially strengthened the leverage of students qua clients consumers;[14] and

(4) as one further manifestation of the marketplace's reign, the emergence of new providers -- real competitors -- some of whom are very well capitalized (for instance, giants of the "infotainment" industry). These creative and technologically very advanced entrepreneurs -- some presumably with emerging ambitions for

capturing education market share -- will increasingly be able to compete with traditional higher education. They will seek market share for packaged courses and, much more problematic for traditional higher education providers, some will offer entire degree programs, finding it not too difficult to surmount barriers traditionally posed by accreditation.

In short, these forces leave little doubt that within twenty years or less, things will be very different throughout much of higher education.

Here are several additional developments to contemplate.

> •The reconfiguration of the faculty. The cadre of core faculty is shrinking in relation to other types of academic appointments. Tenured and tenure-track faculty appointments may well become clustered disproportionately at the more affluent, more selective -- some would say elite -- colleges and universities. Put another way, an expanding number of faculty members are being consigned to more marginalized, more vulnerable, contingent roles as part-time and term appointees.

Beyond these familiar types of off-ladder appointments, other academic roles are emerging -- byproducts of technological opportunities -- that might be called "quasiacademic." There are, for instance, the managers of distance learning, who are becoming a more prominent (if not altogether new) factor in academic staffing. This emerging category of higher education professionals has been characterized as academics whose roles are blended with administrative responsibilities (nothing new there) but who effectively make decisions about curricular content and priorities and delivery modes that may bypass traditional faculty input.[15]

So, it is not preposterous to ask: are we witnessing-retreat back toward a philosophy of academic staffing long ago abandoned in the U.S.? Maybe, just maybe, we now find ourselves on a retrogressive path, backpedaling toward a model prevalent in Europe in the previous century featuring single influential professor per academic field with other faculty members relegated to the outer precincts in terms of status and influence. While the old model will not entirely displace a more egalitarian approach, the rapid escalation in the use of non-ladder appointments is a reality with, given prevailing conditions, no clear end in sight.

Academic collective bargaining. Changes in the composition of the faculty and the nature of their academic appointments hold profound implications for labor-management relations and for collective bargaining. Consider the following. First, the steady infusion of new faculty members means that collective bargaining advocates have an unending task of educating new faculty members -- whether or not at institutions where the faculty is represented by a bargaining agent. The new faculty are not only sizable, but they are likely to have had relatively little exposure to the fundamentals of collective bargaining in a higher education context (or anywhere else, for that matter). Moreover, these new faculty members, as indicated earlier, are likely to be much different from their more senior colleagues in their background characteristics; accordingly, they may need to be approached in ways more relevant to their concerns and agendas than they are likely to be responsive to the concerns and agendas of their senior associates.

An even more basic challenge for collective bargaining proponents is the trend whereby contingent academic workers are displacing traditional ladder-rank faculty members. Collective bargaining proponents will need to demonstrate collective bargaining's relevance to prospective supporters who likely will have become accustomed to a volatile environment affording little security. This also means that the bargaining unit must learn how to deal more effectively with a multileveled, class-based profession of academic worker, more so than has been the case in many decades.

ON STRATEGY

Finally I offer a brief comment to suggest strategies that could be useful to counteract the further reduction of the core faculty and the likely corresponding erosion in the quality of the academic workplace. Consider these three strategies.

First is the need for strategic prioritizing by the faculty. In the current environment, zealous reformers, some of them faculty members, convinced that they are the realists who comprehend the inevitability and desirability of sweeping change, press for wholesale transformation and for the prioritizing of organizational nimbleness in academic staffing as a necessary means for assuring higher education's effectiveness. They are pitted against a larger body of faculty, feeling itself embattled, and too often resistant to any meaningful change. Tensions of this sort have always been present in higher education, but the prospect looms large that these tensions will be exacerbated by the destabilizing trends well underway.

The consequence is that the academic profession must be much more strategic in picking its battles, because the world of higher education *is* going to change profoundly -- with or without the active, constructive involvement of the faculty. This places all the more burden on the faculty to accommodate where accommodation makes sense but to focus its energies on the truly "non-negotiable" priorities. This strategic shift will not come easily; trading off features of traditional academic practice is hard. But lying across the railroad tracks will lead only to catastrophe.

Second is the need to reframe issues in terms of student interests and the quality of the teaching-learning process. Put bluntly, it is hard indeed to find anyone in the current environment who is concerned about the faculty's welfare, except, of course, the faculty -- and their concern is too easily dismissed as special pleading. Where I believe the faculty and their allies among higher education's leadership have done a marginal job is in advancing the crucial notion that the quality of education is directly dependent on the quality of the faculty. Student interests will in many instances be ill-served by an ever more transient faculty, one that is less accessible to students, less integrated into institutional life, less committed to the institution.

Moreover, if the trends that are now manifest continue, academic careers will be rendered less and less attractive. The costs to society, though impossible to measure directly, will be huge as highly able young people, possessing considerable career mobility, opt for careers outside the academy.[16] Such an argument is not easy to get across. It is subtle; probative evidence is elusive. Yet, unless the faculty is much more successful in linking the quality of academic life to the quality of the education process, the faculty will lose the current battles and, inevitably, the war. The linkage does exist; however, demonstrating that it exists requires more resourcefulness and strategic thinking than has been evident to date. Indeed, the failure to convince policymakers -- and the public at large -- of this vital interdependence will undermine the quality of higher education in fundamental ways.

A third strategy is that colleges and universities need to reassess their commitment to teaching and their concomitant expectations that faculty members publish more and more. This proposition holds especially for the "crossover" institutions. These are the many hundreds of institutions that historically prized effective teaching but that, in this powerful buyers' market, have been able to hire faculty with strong research orientations and skills. In the process, more complex institutional missions have emerged, and teaching, by many accounts, has routinely been devalued. The faculty reward system at many institutions requires adjustment to give weight to a broader range of faculty endeavors.[17] Such adjustments in the faculty reward system will not come easily, but the importance of boosting the attention devoted to more effective teaching lies not just in the improvement particularly of undergraduate education but also in the strategic potential for demonstrating a deeper commitment to students.[18]

Higher education finds itself lurching toward change, in Donald Kennedy's apt phrase.[19] The "lurching" may be inevitable, given that American higher education is so radically decentralized; no one's in charge. In the face of formidable forces that are reconfiguring academic appointments and reshaping academic careers, the challenge is whether the faculty can be more effective in making its case for the preservation of core academic values. The stakes for the faculty and their vital contributions are enormous. So, too, are the stakes for society.

ENDNOTES

1. Jerome B. Komisar, "Investing In Our Faculty," Paper prepared Wingspread Conference on Faculty Exchange, Racine, WI, July 25, 1983.

2. Quoted in Robert Lenzner and Stephen S. Johnson, "Seeing Things as They Really Are," Forbes, Mar. 10, 1997, at p. 127.

3. Eli M. Noam, "Electronics and the Dim Future of the University," Science, vol. 270, October 13, 1995, p. 247.

4. Clark Higher, The Uses of the University, 3rd ed. (Cambridge, MA: Harvard University Press, 1982). See especially, "Postscript-1982."

5. Burton R. Clark, Academic Life: Small Worlds, Different Worlds, (Princeton, NJ: Carnegie Foundation for the Advancement of Teaching, 1987).

6. This section borrows from Martin J. Finkelstein, Robert K. Seal, and Jack H. Schuster, The New Academic Generation: A Profession in Transformation, (Baltimore: The Johns Hopkins University Press, forthcoming).

7. This point has been made by Richard Chait. See, e.g., "Innovative Modifications of Traditional Tenure systems." New Pathways Working Paper Series, No. 9. Washington, D.C.: American Association for Higher Education, 1997.

8. "Not So Good: The Annual Report on the Economic Status of the Profession," Academe, May-June 1997, vol. 83, no. 2, pp. 14-39, especially Table 1 (p. 16) and Fig. 1 (p.17).

9. The public's confidence in higher education (although not exactly the same thing as the public perception of the faculty) has shown a long, disturbing decline. The Harris Poll found that in 1966, 61% of respondents rated higher education as commanding "a great deal of confidence," but that percentage fell to 36% in 1980 and dipped to 27% in 1995. (See Clark Higher, "Speculations about the Increasingly Indeterminate Future of Higher Education in the United States," Review of Higher Education, vol. 20, no. 4, 1997, pp. 345-356 at p. 355).

10. Finkelstein, Seal, and Schuster, op. cit.

11. Most NSOPF-93 survey respondents replied during the Fall of 1992. Accordingly, the new faculty cohort, by our definition, had been hired between 1986 and 1992. We are not aware of any developments that, in the time since 1992, likely would have reduced the proportion of faculty that are "new."

12. The precise figures are 514,976 full-time faculty: 172,318 new cohort; 345,657 senior cohort.

13. Frederick F. Reichheld. The Loyalty Effect: The Hidden Force Behind Growth, Profits, and Lasting Value. (Boston: Harvard Business School Press, 1996).

14. The watershed event that began to shift leverage in the direction of students as consumers was surely the Education Amendments of 1972 by which Congress decided to funnel most federal student financial aid to students rather than to institutions of higher education.

15. John S. Levin, "Professionalizing the Management of Community College Curriculum: Educational and Informational Technology and Distance Education," Paper presented at the Annual Meeting Association for the Study of Higher Education, Memphis, TN, Nov. 1996.

16. Howard R. Bowen and Jack H. Schuster, American Professors: A National Resource Imperiled. (New York: Oxford University Press, 1986).

17. See, for example, Ernest L. Boyer. Scholarship Reconsidered: Priorities of the Professoriate (Princeton, NJ: Carnegie Foundation for the Advancement of Teaching, 1990).

18. See, for example, James S. Fairweather, Faculty Work and Public Trust: Restoring the Value of Teaching and Public Service in American Academic Life. (Boston: Allyn and Bacon, 1996).

19. Donald Kennedy, "Another Century's End, Another Revolution for Higher Education," Change, vol. 27, no. 3, May/June 1995, pp. 8-15.

VI. LEGAL ISSUES IN HIGHER EDUCATION

A. Collective Bargaining and the Courts: An Empirical Analysis of Judicial Review of National Labor Relations Board Decisions and Arbitration Awards

B. A Tale of Two Statutes or Why Plaintiffs' Attorney Should Avoid the Americans with Disabilities Act but Utilize the Family and Medical Leave Act

C. Compliance with the Family and Medical Leave Act and the Americans with Disabilities Act: Issues for College Faculty

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LEGAL ISSUES IN HIGHER EDUCATION

A. COLLECTIVE BARGAINING AND THE COURTS: AN EMPIRICAL ANALYSIS OF JUDICIAL REVIEW OF NATIONAL LABOR RELATIONS BOARD DECISIONS AND ARBITRATION AWARDS

Richard N. Block, Professor
School of Labor and Industrial Relations
Michigan State University

I. INTRODUCTION

The judiciary in the United States has long been a major player in collective bargaining in the United States. The earliest recorded judicial decision in a labor case was issued in 1806, when a Philadelphia court found that the journeymen cordwainers (shoemakers) in the city had acted in violation of common law by insisting that they would work only at special rates, that they would prevent from working other workers who were willing to work at low rates, and that they would refuse to work with those who were not members of their society.[1] Subsequent to the cordwainers case, for example, courts issued injunctions to prevent picketing in labor disputes, and interpreted both the Sherman and Clayton Anti-Trust Acts to cover union activity.[2]

The passage of the National Labor Relations Act in 1935, on its face, should have reduced the involvement of the courts in labor disputes. Passage of a federal law would preempt much of state court jurisdiction over labor disputes.[3] More important, the creation of the National Labor Relations Board[4] to interpret the Act suggested that Congress wished to leave labor relations litigation to be decided by an expert administrative agency rather than the judiciary. Yet, a person "aggrieved" by an order of the Board could appeal to the courts of appeals and request Supreme Court review, and the Board was also authorized to request the courts of appeals to enforce its orders.[5] This was seen as rectifying a flaw in the authority of the National Labor Board and the first National Labor Relations Board created under the Section 7(a) of National Industrial Recovery Act of 1933.[6] Overall, however, the structure of the statute seemed to suggest a reduced role for the courts in the collective bargaining system.

Despite this overarching structure, the courts continue to play an active, involved role in collective bargaining in the United States. This paper will demonstrate that this is especially the case in the absence of a collective bargaining agreement, when there is a representational dispute or when the parties are negotiating a collective agreement. The courts have taken a less active role in collective bargaining when there is a collective agreement in place.

The question of the extent of judicial involvement in collective bargaining activity is a matter of fundamental importance. The greater the judicial involvement in collective bargaining, the less important will be the role of specialized, expert collective bargaining/labor relations institutions such as the National Labor Relations Board. The NLRB is more likely, as an institution, to be sensitive to labor relations issues within disputes that may not be clear to the courts. Courts are likely to place greater emphasis in labor relations law on property rights and harmonizing labor relations law with other legal doctrines.[7]

This paper will explore judicial involvement in collective bargaining in these two broad situations, e.g., in the absence of a collective agreement, and in the presence of a collective agreement. Part II of the paper will explore differences in the basic legal doctrines governing judicial involvement in each of these situations. Parts III will present data that provides insight in these differences. Part IV will present some conclusions.

II. GOVERNING LEGAL DOCTRINE

This section of the paper will analyze the governing legal doctrines on the relationship between the courts and labor relations in the two major situations in which labor relations cases arise: collective bargaining in the absence of a collective agreement, and collective bargaining in the presence of a collective agreement.

The Courts and Labor Relations in the Absence of a Collective Agreement

Private sector[8] labor relations in the United States occurring in the absence of a collective agreement is governed by the National Labor Relations Act (NLRA). The NLRA, in turn, is administered by the National Labor Relations Board, a specialized administrative agency.

Gellhorn and Byse[9] point out that Congress created administrative agencies to apply the facts in controversies to general policy in a continuous manner that is far too frequent and detailed for either legislative control or judicial intervention. Congressional responsibilities were too broad to regulate conduct that involved consistency between policy and conduct when decisions were being made by the numerous affected parties on a regular basis. Similarly, judicial involvement was inappropriate because the large number of small, highly specialized controversies would tax judicial resources. Moreover, judges would likely see the controversy as one isolated piece of litigation, whereas an administrative agency, with expertise and continuity through specialization, would more likely see the deeper policy implications of seemingly small controversies within its own area of expertise. In general, Gellhorn and Byse describes the rationale for the administrative process as coming from "(t)he need for continuous expert supervision, capable of *ad hoc* development to parallel the development of the subject matter involved..."[10]

In addition to these general principles, Gellhorn and Byse point to another reason for creation of the administrative agencies, and the National Labor Relations Board, in particular. He observed

> t(he) policy declared in the Federal Trade Commission Act and the National Labor Relations Act departed from what had been the previous law on the subject. Indeed, judicial hostility to, or at least lack of sympathy with, the efforts of labor to organize and bargain collectively was in no small part responsible for the Labor Act. Over a substantial period prior to 1935, the courts had, through judicial legislation, emphasized labor's wrongs over labor's rights. The proponents of the new law felt that courts might have difficulty in sloughing off their former attitudes, and that those attitudes were not consonant with present policies. Since the Labor Act was intended to reverse an existing legal and judicial trend, the task of carrying out the Congressional mandate was assigned to an official instrumentality other than that which had developed, if not created, the rejected policy.[11]

Despite the inherent advantages of an administrative agency, the NLRB, in interpreting the NLRA, held the courts were an integral part of the statute. A Board order was not self-enforcing; enforcement must be enforced by petition to a court of appeals, with the court decision subject to review by the Supreme Court.[12] Similarly, "any person aggrieved by a final order of the Board" could obtain court of appeals review of the Board's order, with a right to request Supreme Court review.[13]

What was the relationship between the Board and the courts? The landmark case involving judicial review of Board decisions (as well as decisions of other administrative agencies) is Universal Camera Corporation v. NLRB.[14] That case arose in the context of the 1947 Taft-Hartley amendments to Section 10(e) and 10(f) of the NLRA which required the Board to base its decisions on "substantial evidence on the record considered as a whole" rather than on merely "evidence" as provided in the Wagner Act and the passage of the Administrative Procedure Act, which included identical wording.[15] The case also addressed a perception of judicial abdication of responsibility in reviewing Board decision and the level of scrutiny the courts were to give Board decisions.

With respect to overall judicial responsibility, the Court observed that Congress had expressed a concern that courts take greater responsibility than it was perceived they had previously done in reviewing the decisions of the Board (and other administrative agencies). The courts were to assure that the evidence on which the Board made its decision was, indeed, "substantial," and did not consist of hearsay, opinion, and emotional speculation in place of factual evidence."[16] The Court noted that

> (n)o doubt some, perhaps even much, of the criticism was baseless and some surely was reckless. What is here relevant, however, is the climate of opinion thereby generated and its effect on Congress. Protests against "shocking injustices" and intimations of judicial "abdication" with which some courts granted enforcement of the Board's orders stimulated pressures for legislative relief from alleged administrative excesses.[17]

Thus, the Court suggested in one part of its opinion that the passage of the Administrative Procedure Act and the Taft-Harley changes, had, as one purpose, increasing the responsibility of the courts for reviewing NLRB decisions.

At the same time, however, the Court was concerned about appeals courts supplanting the Board's authority in interpreting the NLRA. The Court observed:

> (T)he requirement for canvassing "the whole record" in order to ascertain substantiality...(was not) intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.[18]

This provided the appeals courts the proper scope of review. Later in the opinion, the Court pointed out that this did not mean that the courts should not take proper responsibility.

> (C)ourts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than courts have shown in the past....Congress has imposed on them the responsibility for assuring that the Board stays within reasonable grounds. That responsibility is not less real because it is limited to the requirement that evidence appear substantial when viewed on the record as a whole...[19]

These three passages suggest a mixed message to the courts of appeals. On the one hand, they were instructed to take responsibility to review Board decisions to assure that, indeed, they were made based on the record as a whole. On the other hand, they were not to substitute their judgment for the judgment of the Board as between "fairly conflicting views."

The Supreme Court addressed judicial review once again in 1990, in NLRB v. Curtin Matheson Scientific.[20] In that case, in which the Court upheld a Board rule that it would make no presumption regarding union support, or lack of union support, among picket line crossovers and replacement workers during a strike, the Court observed:

> This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy....This Court therefore has accorded Board rules considerable deference....We will uphold a Board rule as long as it is rational and consistent with the Act....even if we would have formulated a different rule had we sat on the Board....Furthermore, a Board rule is entitled to deference even if it represents a departure from the Board's prior policy.[21]

Universal Camera and Curtin Matheson suggest a narrow scope of judicial review of the substance of Board decisions. Yet, the Court's admonition on "judicial abdication" in Universal Camera stands. Thus, it is not surprising that there is uncertainty regarding the scope of judicial review of Board decisions. Writing recently, Hardin, et. al.[22] have observed that

> The Universal Camera rule has been interpreted in differing ways by the court of appeals. Although all the circuits have quoted the same Universal Camera language, they have not reached the same conclusions as to the meaning of that language.[23]

They then went on to observe that:

> The wide variety of factual situations presented in the cases make it virtually impossible to determine whether the circuits are applying Universal Camera uniformly. Some cases suggest a trend towardmore critical scrutiny of the Board's factual determinations, particularly in the Second Circuit; yet other cases seem to contradict the existence of a trend.[24]

The Courts and Labor Relations in the Presence of a Collective Agreement

While Universal Camera may have left some room for ambiguity in defining the relationship between the courts and the NLRB in labor relations matters where no collective agreement is in effect, no such ambiguity exists where a collective agreement is present. In United Steelworkers v. Enterprise Wheel and Car Corp.,[25] the Supreme Court clearly stated that the authority of the judiciary to review an arbitration decision issued under a collective agreement was severely limited.

In Enterprise, the employer had initially declined to arbitrate a grievance involving the discharge of a group of employees who had walked off the job in protest of the discharge of another employee. A district court eventually directed the employer to arbitrate, and the arbitrator found that the employer had violated the agreement by discharging the employees, reducing the penalty to a 10-day suspension. The employer was directed to reinstate the employees with back pay less monies from the 10-day suspension and less any interim earnings. The arbitrator also ruled that the expiration of the agreement during the period of time between the grievance and the arbitration hearing did not remove his authority to decide the case. The employer refused to comply with the award, and, after the district court directed compliance, the appeals court overturned the award, saying that the inclusion in the back pay award of monies owed subsequent to the expiration of the contract rendered the award unenforceable.

In reversing the court of appeals, the Supreme Court permitted only a narrow scope of review for arbitration awards. The arbitrator's authority derives from the agreement. That authority was given to the arbitrator by the parties, so long as the arbitrator acted within that authority, the courts could not substitute their judgment, e.g., their interpretation of the agreement, for that of the arbitrator. The Court observed:

> The collective bargaining agreement could have provided that if any of the employees were wrongfully discharged, the remedy would be reinstatement and back pay up to the date they were returned to work. Respondent's major argument seems to be that by applying correct principles of law to the interpretation of the collective bargaining agreement it can be determined that the agreement did not so prove, and that therefore the arbitrator's decision was not basedupon the contract. The acceptance of this view would require courts, even under the standard arbitration clause, to review the merits of every construction of the contract. This plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final....(T)he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for, and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.[26]

In United Paperworkers International Union v. Misco,[27] decided in 1987, the Supreme Court reaffirmed and reinforced its Enterprise Wheel and Car doctrine. Misco, a paper converting company in Monroe, Louisiana, employed one Isaiah

Cooper, whose job involved operating dangerous paper cutting equipment. Misco discharged Mr. Cooper on February 7, 1983, for bringing drugs onto the plant premises. The discharge was triggered by information supplied to the company by Mr. Cooper on January 24 that he had been arrested for marijuana possession in his home. On January 27, the company learned that Mr. Cooper had actually been arrested for being present on January 21 in a car on company property in which was found marijuana smoke and a marijuana cigarette. The car did not belong to Mr. Cooper.[28]

A grievance was filed that was processed to arbitration. On September 21, five days before the arbitration hearing, the company learned that on the same day that Mr. Cooper had been arrested for his presence in a car that did not belong to him, the police had found a plastic scale and marijuana gleanings in his car. At the hearing, the arbitrator refused to accept as evidence testimony about the scale and marijuana gleanings in Mr. Cooper's car, because the Company did not have this information at the time it discharged him. The arbitrator also sustained Mr. Cooper's grievance on the ground that Mr. Cooper's presence in a car with a lighted marijuana cigarette and marijuana smoke did not prove that he possessed marijuana on company property.[29]

The employer filed suit to vacate the award. The district court agreed, and vacated the award as being contrary to general state safety concerns about operating dangerous machinery while under the influence of drugs and contrary to state criminal laws against possession of marijuana. The court of appeals upheld the decision of the district court. The court of appeals found that the arbitration award was contrary to the public policy prohibiting the operation of dangerous machinery while under the influence of drugs. The court also found that Mr. Cooper had possessed marijuana on the company's premises, stating that the arbitrator's focus on the procedural rights of Mr. Cooper caused him to disregard what he knew was true - that Mr. Cooper was in possession of marijuana on company property.[30]

In reversing the court of appeals, the Supreme Court reaffirmed its view of arbitration pronounced in Enterprise Wheel and Car,

> Collective-bargaining agreements commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances. In such cases, and this is such a case, the Court made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be

> undermined if courts had the final say on the merits of the awards." Steelworkers v. Enterprise Wheel & Car Corp.,....As long as the arbitrator's award "draws its essence from the collective bargaining agreement," and is not merely "his own brand of industrial justice," the award is legitimate...(A)s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.[31]

This deference given to the arbitrator's authority also extended to procedural matters, such as the admission of evidence, as well as the fashioning of a remedy. The arbitrator was constrained by the words of the collective agreement, but so long as the arbitrator did not act outside of the agreement, the award was immune from attack. In this case, the court noted, the only evidentiary limitation on the authority of the arbitrator was the exclusion of hearsay evidence. There was nothing in the contract that prohibited the arbitrator from excluding post-discharge evidence, nor was there anything in the contract that constrained the arbitrator's remedial authority.[32]

The Court also found without merit the court of appeals' public policy rationale. Even if one assumed that it was within a court's authority to vacate an arbitration award based on public policy considerations, the existence of such a public policy must be based on a reference to statutes and judicial decisions. "(G)eneral considerations of supposed public interest," such as those on which the court of appeals relied upon on Misco, would not suffice to support the existence of a public policy.[33]

Finally, even if it was assumed that the award could be vacated on the grounds that it violated public policy, the Court could not find any evidence that Mr. Cooper had acted in violation of such a public policy. There was no connection made between any marijuana gleanings in his car and possession of marijuana while on the job.[34]

An Overview of Legal Doctrine

The foregoing discussion of the key Supreme Court cases in the area of judicial review of court decisions suggests that courts are likely to exercise greater discretion in overturning decisions of the National Labor Relations Board than in overturning arbitration awards. Although Universal Camera prohibits courts form substituting their judgment for the judgment of the Board, the admonition to the courts to be vigilant in reviewing Board decisions for compliance with "substantial evidence considered on the record as a whole" standard provides a judicial vehicle for aggressively reviewing Board decisions.

No such vehicle is available to the courts to review arbitration awards. Courts are clearly constrained in the grounds on which they may overturn arbitration decisions. They are prohibited from substituting their judgment for the judgment of arbitrators.

III. EMPIRICAL ANALYSIS OF JUDICIAL BEHAVIOR

The discussion in part II of this paper suggests a testable hypothesis. Given these differences in the reviewing authority of the judicial branch, one should see a greater tendency for courts to overturn NLRB decisions than to overturn arbitration decisions. Thus, the percentage of NLRB cases in which the courts deny enforcement should be greater than the percentage of arbitration awards which the courts vacate.

In order to test this hypothesis, relevant court decisions issued during the period July 1, 1995 - June 30, 1996 were examined to determine the frequency with which the courts overturned NLRB unfair labor practice decisions and arbitration awards. In order to obtain the data on court review of unfair labor practice decisions, all court of appeals decisions involving the NLRB issued between July 1, 1995 and June 30, 1996 that were available on the World Wide Web were analyzed.[35] This was supplemented by searching the Labor Relations Reference Manual for any court of appeals decisions involving the NLRB, since most, but not all, courts of appeals decisions are posted on the web. This dual search yielded 87 cases.

A Board decision was defined as "enforced" or "upheld" if the Board enforced the major remedy, and "reversed" otherwise. For example, a court decision was defined as "reversed" if the case involved an unfair labor practice charge in which the Board issued a bargaining order, but the court declined enforce the bargaining order, although it upheld the finding of the unfair labor practice charge.[36] This decision rule was based on the view that the goal of the employer in such situations is to avoid a bargaining relationship with the union .

Court cases that involved a decision on vacating an arbitration award were obtained through Lexis-Nexis using the following search parameters with the "LRRM" library: "arbitration w/2 award and 1995 and 1996." This search located 46 cases involving a judicial decision on vacating an arbitration award. Classifying these cases involved no judgment. In all cases, the award with either vacated, or it was not.

Tables One and Two present the results. Table One presents the results for the court review of the NLRB cases, and Table Two presents the results for the court review of the arbitration cases. The cases are listed in ascending date order, within each table. For clarity, the cases in Table One are arranged by circuit. As can be seen, the results generally support the hypothesis regarding court review. If one considers remands as cases not enforced, the courts of appeals enforced

Board orders in 64.9 percent of the cases during this time period, while upholding 80.4 percent of the arbitration awards. A standard Analysis of Variance test (ANOVA) generates an F statistic of 3.37, indicating that this difference in means is significant at the .07 level.[37]

While a detailed examination of each of the cases is beyond the scope of this paper, analyzing the court's decision-making in several of the cases can yield insights into the effect of the different Supreme Court standards for review. For example, in Rock-Tenn v. NLRB,[38] the court provided the following standard of review:

> (t)he Board's findings of fact are "conclusive" when supported by substantial evidence on the record as a whole....Substantial evidence means evidence that reasonable minds might accept as adequate to support a conclusion....We also review the Board's application of law to fact under the substantial evidence standard. Id. We will uphold the Board's conclusions of law unless they are "irrational or inconsistent with the Act. (Citations omitted.)[39]

Using this standard in this case, the court enforced the Board's order that the employer, during a decertification campaign, had improperly insisted on a contract that would expire at the end of the certification year. The court upheld the Board's finding that the employer did not have sufficient evidence on which to base a good faith doubt about the union's majority status.

On the other hand, when a court wished to reverse the Board's decision, it simply relied on its right to undertake a diligent review. In K-Mart Corp. v. NLRB, the court observed:

> ...the Board's determination must be upheld if "its factual findings are supported by substantial evidence in the record," considered as a whole, and if "its legal conclusions have a reasonable basis in the law."...We may not displace the Board's conclusions simply because we would reach a different result if we reviewed the case *de novo*....Our review, therefore, is limited and deferential...Deference, however, does not entail complete abdication of the judicial role. (citations omitted)...Thus, when an ALJ's credibility determinations are based upon "inadequate reasons or no reasons at all," they need not be upheld. NLRB v. Cutting, Inc., 701 F.2d 659, 667 (Th Cir. 1983); accord Blue Circle Cement Co. v. NLRB, 41 F.3rd. 203, 206(5th Cir. 1994). Likewise, when the Board's conclusion on a central issue is supported by inadequate findings, a remand for further factual development is appropriate. (citations).[40]

The Seventh Circuit remanded the case to the Board because it did not believe that the ALJ and the Board gave adequate treatment to testimony by employees that they were intimidated by union photographs during an organizing campaign that the Board had found to be otherwise lawful. In this case, the Court analyzed the testimony rather than accepting the Board's reasoning that otherwise lawful photography could not coerce employees.

In all but one of the cases in which arbitration awards were overturned, the decision was based on clear error.[41] For example, in Public Safety Employees Association v. State of Alaska, the Supreme Court of Alaska ruled that an arbitrator had acted improperly by requiring an employer to make a payment prohibited by state law.[42] Similarly, in Midwest Central Education Association v. Illinois Educational Labor Relations Board and Midwest Central Unit School District No. 19, an Illinois appellate court vacated an arbitration award reinstating a non-tenured teacher because the award was in violation of an Illinois statute which provided that a school district had the absolute right to terminate a nontenured teacher.[43]

Houston Light and Power v. IBEW Local 66[44] represents an example of a grievance in which a court found that the arbitrator had exceeded his authority, and possibly an exception to the principle of deference to arbitration awards. In Houston Light and Power, the arbitrator had determined that, while the procedure the employer had used for determining qualifications in a layoff situation was reasonable, the employer had misapplied the criteria. In vacating the award, the Fifth Circuit held that because the agreement provided the company with the right to determine an employee's ability, skill and qualifications, the only matter on which the employee could file a grievance was whether "the system and procedures used by the Company in evaluating an employee's ability, skill and qualifications were inconsistent with the terms of the Agreement or were an improper application of the Agreement." Reversing the district court, the court of appeals ruled that the arbitrator did not have the contractual authority to overturn the employer's judgment, once the arbitrator had found that the system did not violate the contract.

IV. SUMMARY AND CONCLUSIONS

The analysis presented in this paper suggests that different standards of review can have an effect on court decisions reviewing NLRB and arbitration decisions, respectively. As noted, the authority of courts to review Board decisions can be interpreted as ambiguous, while the authority of courts to review arbitration awards is explicitly narrow. This difference manifests itself in the percentage of decisions in which courts overturn Board and arbitration decisions. During the period July 1, 1995 - June 30, 1996, whereas courts upheld 80 percent of all arbitration awards brought before them, they upheld on 64 percent of all unfair labor practice charges brought before them.

Those results should be taken with several caveats. First, the time period was short, and many not necessarily be representative. Brudney, for example, found that during the period October 28, 1986 through November 2, 1993, the court affirmance rate was 77 percent,[45] substantially higher than this estimate of 64.9 percent. NLRB data show that between fiscal 1970 and fiscal 1991, its success rate, defined as cases in which it was upheld "in whole or in part," ranged from 76.2 percent to 89.4 percent, with a mean for this period of 83.8 percent.[46]

Second, judicial levels and jurisdictions are not comparable. While all NLRB decisions were reviewed in the United States courts of appeals, arbitration awards were reviewed at all levels of the federal judiciary, as well as in state judicial systems.

Third, the analysis is limited only to those cases that went to court. If that universe consists of close cases, or cases in which the Board or arbitrators were more likely than otherwise to err, one might expect a high "reversal" rate. On the other hand, if losing parties make a similar calculus when deciding whether to go to court for NLRB orders and arbitration awards, the results comparing the two kinds of cases should not be affected.

Despite these caveats, the analysis in this paper does provide some insights. At least two observations should be made. First, courts can be aggressive. They are apparently quite willing to use the ambiguity on Universal Camera to scrutinize and overturn Board decisions. While one might fairly conclude that the Board, on occasion, errs, it seems unlikely that the Board erred in more than a third of its cases that went before the courts of appeals during this one-year period.

Second, limits on judicial discretion can be effective. If there is any desire to create a collective bargaining system that is self-contained and administered by industrial relations experts, then it may be necessary to place explicit limits on judicial discretion. Labor arbitration in the United States appears to be a successful, healthy, subsystem within an otherwise struggling collective bargaining system.[47] It is likely that the finality inherent in arbitration, supported by a U.S. Supreme Court-mandated narrow scope of review, is a major contributing factor.

Similarly, the industrial relations systems in Canada are also healthy. The unionization rate in Canada is roughly 32 percent,[48] while that the of the unionization rate in the United States was approximately 16.2 percent in 1996.[49] It is likely that the narrow scope of judicial review of Canadian labor board decisions resulting from the presence of private clauses in the provincial and federal collective bargaining legislation has raised the status of the collective bargaining system and the agencies that administer it.[50]

The purpose of this paper has been to generate some hypotheses about the involvement of the judiciary in the collective bargaining system through the process of judicial review and to attempt a preliminary test of one of those hypotheses. The results presented in this paper, as well as the discussion that followed, suggest that judicial review in the collective bargaining system is not a random element. Rather, the results suggest that the extent to which industrial relations policy and practice is determined by industrial relations experts or judges is a matter of choice.

ENDNOTES

1. See,Commonwealth v. Pullis, Philadelphia Mayor's Court, 1806, reprinted in Bernard Meltzer, Labor Law: Cases, Materials, and Problems (Boston and Toronto: Little, Brown and Co., 1977), pp. 16-20.

2. See, for example, Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 77 (Mass. Sup. Ct., 1896) reprinted in Walter E. Oberer, Kurt L. Hanslowe, and Timothy J. Heinz, Cases and Material on Labor Law: Collective Bargaining in a Free Society 4th Ed. (St. Paul, Minn.: West Publishing Co., 1994), pp. 31-38 and Charles O. Gregory, Labor and the Law, 2nd ed. (New York: W.W. Norton, 1961), pp. 83-104. See, also, Loewe v. Lawlor, 208 U.S. 274 (1908): Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); and Gregory, op. cit. pp. 201-202. For a recent analysis of the development of judicial involvement in labor relations during the period 1880-1920, see Daniel R. Ernst, Lawyers Against Labor: From Individual Rights to Corporate Liberalism (Urbana and Chicago, University of Illinois Press, 1995).

3. See, for example, San Diego Building Trades v. Garmon, 359 U.S. 236 (1959). There are exceptions, such as where the state has long been involved in regulating in the area. See, for example, New York Telephone Co. v. New York State Department of Labor, 440 U.S. 519 (1979) (state law providing unemployment benefits to strikers is not preempted by federal policy requiring that government not regulate the weapons of bargaining), and Hawaiian Airlines v. Norris, 114 S. Ct. 2239 (1994) (denial of a discharged employee's grievance at the first step of the grievance procedure in the collective agreement does not prevent the employee from seeking redress under a state doctrine involving unjust discharge).

4. See Section 3 of the National Labor Relations Act, as amended.

5. See Sections 10(e) and 10(f) of the National Labor Relations Act, as amended.

6. See, for example, Harry A. Millis and Emily Clark Brown, From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations (Chicago: The University of Chicago Press, 1950), pp. 23-30.

7. See, for example, Richard N. Block and Benjamin W. Wolkinson, "Delay in the Union Election Campaign Revisited: A Theoretical and Empirical Analysis," in Advances in Industrial and Labor Relations, Vol. 3, David B. Lipsky and David Lewin, eds. (Greenwich, Conn.: JAI Press, 1986), pp. 43-82 and Gelhorn and Byse, Note 9, below.

8. This section of the paper will be limited to the legal doctrine on judicial review of NLRB decisions. A discussion of judicial review of state labor relations boards, regulating primarily public sector labor relations in the individual states is beyond the scope of this paper.

9. Walter Gelhorn and Clark Byse, Administrative Law: Cases and Comments (Mineola, New York: The Foundation Press, 1974), pp. 2-7.

10. Ibid., p. 5.

11. Ibid., p. 6.

12. National Labor Relations Act, Section 10(e).

13. National Labor Relations Act, Section 10(f).

14. 340 U.S. 474 (U.S. Sup. Ct., 1951).

15. In Universal Camera, the Supreme Court observed that it had consistently interpreted the word "evidence" as "substantial evidence" (340 U.S. 474, 477).

16. 340 U.S. 474, 478.

17. 340 U.S. 474, 478-79.

18. 340 U.S. 474, 488.

19. 340 U.S. 474, 490.

20. 494 U.S. 775 (1990).

21. 494 U.S. 775, 786.

22. The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act, Patrick Hardin, Editor-in-Chief, Washington, D.C., Bureau of National Affairs, 1992.

23. Ibid., p. 1888.

24. Ibid.,pp. 1889-90.

25. 363 U.S. 593 (1960).

26. 363 U.S. 593, 598-99. The court also specifically stated that ambiguity in its opinion is not grounds for overturning the award, noting that arbitrators have no obligation to support an award with an opinion or reasons (363 U.S. 598).

27. 484 U.S. 29 (1987).

28. 484 U.S. 29, 33-34.

29. 484 U.S. 29, 34.

30. 484 U.S. 29, 34.

31. 484 U.S. 29, 36, 38.

32. 484 U.S. 29, 39, 41.

33. 484 U.S. 29, 44.

34. 484 U.S. 29, 44.

35. The Internet address is http://www.law.emory.edu/FEDCTS/.

36. See, for example, Kinney Drugs, Inc. v. NLRB, 94-4133, 94-4157, 94-4189, 151 LRRM 2379 (2nd Cir., 1996).

37. If one excludes remands from the analysis, taking into account only cases in which the court of appeals issued a final decision either enforcing the Board order or denying enforcement, Board orders were enforced in 68.4 percent of all cases. The associated ANOVA comparing this with the affirmance rate of arbitration award generates an F-statistic of 2.05, which is significant at only the .16 level, far below any accepted standard of statistical significance. Because such remands almost always indicate a court of appeals' dissatisfaction with the Board's disposition of the case, however, it seems more accurate to consider a remand as a decision not to enforce.

38. Rock-Tenn. v. NLRB, 7th Cir., No. 95-2611, November 3, 1995.

39. See Table 1 for citation. Because the text of the cases was downloaded from the World Wide Web, the cases did not include page numbers. Therefore, quotes from the cases will not include a page number citation. The files with full text of the cases are available from the author upon request.

40. See Table 1 for citation.

41. See other cases cited in Table 2, except case cited in Endnote 41.

42. Public Safety Employees Association, Local 92, International Union of Police Associations, AFL-CIO v. State of Alaska, (Sup. Ct. Alaska), 151 LRRM 2855, 1995.

43. Midwest Central Education Association, IEA-NEA v. Illinois Educational Labor Relations Board and Midwest Central Unit School District No. 191; Board of Education of Midwest Central Community Unit School District No. 191 v. Illinois Educational Labor Relations Board and Midwest Central Education Association, IEA-NEA (Ill. App. Ct., 1st Dist, 4th Div.), 153 LRRM 2245 (1995).

44. Houston Lighting & Power Company v. International Brotherhood of Electrical Workers, Local Union No. 66, 151 LRRM 2020 (5th Cir., 1995), 1995.

45. James J. Brudney, "A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process," North Carolina Law Review, Vol. 74, No. 2 (April, 1996), pp. 938-1036.

46. National Labor Relations Board, Annual Reports, Fiscal 1970 - Fiscal, 1991.

47. For example, between Fiscal, 1988 and Fiscal 1996, the Federal Mediation and Conciliation Service issued an annual average of 31,917 panels. See Federal Mediation and Conciliation Service, Arbitration Statistics, Fiscal Year, 1996, FMCS, Office of Arbitration Service, December 13, 1996 (available from author upon request).

48. See, for example, Richard N. Block, "Reforming U.S. Labor Law and Collective Bargaining: Some Proposals Based on the Canadian System," in Restoring the Promise of American Labor Law, S. Friedman, R. Hurd, R. Oswald, and R. Seeber, eds. (Ithaca, N.Y.: ILR Press, 1994), pp. 250-59.

49. U.S. Department of Labor, "Union Members in the United States," Bureau of Labor Statistics, Report No. 97-27, January 31, 1997, Internet address: http://stats.bls.gov:80/newsrels.htm. This is the percentage of employees sixteen years and older who were represented by unions. The percentage employees who were union members in 1996 was 14.9 percent.

50. In general, privitive clauses in Canadian labor relations statutes limit judicial review to claims that the labor relations board did not have jurisdiction over the dispute or that the board denied the complaining party due process. See George W. Adams, Canadian Labour Law, 2nd Ed. (Aurora, Ont.: Canadian Law Book, 1994), pp. 4-1 to 4-52.

TABLE 1

COURTS OF APPEALS DECISIONS IN CASES INVOLVING NATIONAL LABOR RELATIONS BOARD UNFAIR LABOR PRACTICE ORDERS

July 1, 1995 - June 30, 1996

CASE NAME	DATE	CASE NO	BNA CITE	ENFORCED in whole or major part	DENIED in whole or major part	REMANDED
DC CASES						
McDonnell Douglas v NLRB	07/18/95	94-1300				1
CC Eastern	08/01/95	94-1115			1	
IBEW v NLRB	08/11/95	94-1005		1		
SEIU LU 32BJ v NLRB	10/17/95	94-1587		1		
Daily News of LA	01/19/96	95-1047		1		
UFCW LU 880 v NLRB	01/26/96	95-1193		1		
PSEA v NLRB	03/15/96	95-1112		1		
Diamond Walnut Growers v NLRB	03/29/96	95-1075			1	
Canadian American Oil Co v NLRB	04/23/96	95-1284		1		
Charlotte Amphtht dba Blockbuster Pavilion v. NLRB	04/30/96	94-1494				1
Noel Foods v NLRB	05/03/96	95-1096			1	
Sierra Reality Co v NLRB	05/07/96	95-1349			1	
Kwick Care Ltd v NLRB	05/07/96	95-1155		1		
E N Bisso & Son v NLRB	05/31/96	95-1480	152 LRRM 2406	1		
ILWU LU 14 v NLRB	06/07/96	95-1446		1		
Shepard Conv Svs v NLRB	06/11/96	95-1369			1	
Serramonte Olds & Serv Plaza v NLRB	06/18/96	95-1455		1		
Quazite Dv v NLRB	06/28/96	95-1215	152 LRRM 2653			1
			TOTAL	10	5	3
1st Circuit Cases						
Kelley v NLRB	03/26/96	95-1618				
NLRB v Harding Glass	03/27/96	95-1727			1	
NLRB v Boston Dist Council of Carpenters	04/10/96	95-1762		1		
Pegasus Broadcasting of San Juan v NLRB	04/22/96	95-1966		1		
Acme Tile & Terrazo Co v NLRB	06/25/96	95-1992		1		
NLRB v Ominix Intl Corp	05/13/96	91-2106		1		
			TOTAL	4	1	0

Table 1, Page 1

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TABLE 1

COURTS OF APPEALS DECISIONS IN CASES INVOLVING NATIONAL LABOR RELATIONS BOARD UNFAIR LABOR PRACTICE ORDERS

July 1, 1995 - June 30, 1996

2nd Circuit Cases

AT&T v NLRB	**09/29/95**	**94-4232, -4018, -4020**			1	
NLRB v George A Tomasso Const Co	01/17/96	95-4089		1		
NLRB v NALC	**01/19/96**	**95-4104**		1		
Kinney Drugs Inc v NLRB	01/24/96	94-4133, -4157, -4189			1	
Greenspan v NLRB	**03/01/96**	**95-4138, -4152**		1		
Atrium Plaza Health Care Ctr v NLRB	03/08/96	95-4118, -4132		1		
Hartford Hospital v NLRB	**03/14/96**	**95-4104**		1		
Harper Colls San Francisco v NLRB	03/26/96	95-4076(L), -4090			1	
Pyramid v NLRB	**04/01/96**	**95-4148(L), -4168AXP**		1		
Katz Delicatessen of Houston St v NLRB	04/07/95	95-4063		1		
Lihli Fashions Corp v NLRB	**05/09/96**	**95-4100, -4120**		1		
Taber Partners v NLRB	05/29/96	95-4166, -4202		1		
			TOTAL	9	3	0

3rd Circuit Cases

Metro Phil DC Carpenters v NLRB	**10/12/95**	**95-3086**		1		
NLRB v Michael Kong/Nursing Home Ctr @ Vineland	03/11/96	95-3085, -3129		1		
Taylor Hospital v NLRB	**03/26/96**	**95-3382, -3445**	**152 LRRM 2256**	1		
Cavert Acq Co v NLRB	05/02/96	95-3231, -3293	152 LRRM 2229	1		
			TOTAL	4	0	0

4th Circuit Cases

AMF Bowling Co v NLRB (AMF2)	**08/29/95**	**94-2150**			1	
FPC Holdings v NLRB	09/13/95	94-2415		1		
NLRB v Lundy Packing Co	**11/03/95**	**95-1364**			1	
ARA Svs v NLRB	12/05/95	95-1201, -1332	150 LRRM 2993			
NRLB v Carolina Food Proc	**04/22/96**	**95-1678**				
Virginai Concrete v NLRB	02/16/96	95-1284		1		
NLRB v District 17 UMW	**05/13/96**	**95-4104**	**152 LRRM 2512**	1		
NLRB v White Oak Coal Co	ND	none	152 LRRM 2128	1		
			TOTAL	4	2	0

5th Circuit Cases

(none)	08/29/95	94-2150				
			TOTAL	0	0	0

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TABLE 1

COURTS OF APPEALS DECISIONS IN CASES INVOLVING NATIONAL LABOR RELATIONS BOARD UNFAIR LABOR PRACTICE ORDERS

July 1, 1995 - June 30, 1996

6th Circuit Cases

NLRB v Spring Arbor Dist Co	**07/17/95**	**94-5260**			1	
NLRB v Sewell-Allen Inc	07/25/95	95-5505	152 LRRM 2319	1		
Manor West Inv v NLRB	**07/28/95**	**93-5788, -5946**			1	
W F Bolin Co v NLRB	11/17/95	93-5939		1		
NLRB v Mead Corp	**01/08/96**	**94-6250**		1		
Forgings Forever v NLRB	02/23/96	94-6547, -6548	152 LRRM 2319	1		
Carrington South Health Care Ctr v NLRB	**02/28/96**	**94-5811, -5911**			1	
Vemco Inc v NLRB	03/22/96	94-6378, -6500			1	
Dayton-Hudson Dept Store Co v NLRB	**03/29/96**	**94-6092, 6281**		1		
NLRB v KFS Excavating	03/29/96	96-5166	152 LRRM 2319	1		
Autozone Inc v NLRB	**04/24/96**	**94-6280, -6408**	**152 LRRM 2384**	1		
Franklin Iron & Metal Co v NLRB	05/13/96	95-5092, 5239		1		
NLRB v Fox Painting Co	**05/31/96**	**89-6317, -6509**	**152 LRRM 2512**	1		
Smiths Industries Inc v NLRB	06/11/96	95-5400, -5484			1	
NLRB v Nelson	**ND**	**none**	**152 LRRM 2128**	1		
			TOTAL	10	5	0

7th Circuit Cases

Kmart v NLRB	**08/11/95**	**94-3528, -3634**				1
Rock-Tenn v NLRB	11/03/95	95-2611		1		
NLRB v Alwin Mfg	**03/04/96**	**95-1921**		1		
Chicago Tribune v NLRB	03/19/96	95-1942, -2221			1	
NLRB v Electro-Voice	**04/26/96**	**95-2611**				
E & L Transport Co v NLRB	06/05/96	94-3490, -3685			1	
			TOTAL	2	2	1

8th Circuit Cases

F L Thorpe v NLRB	**12/01/95**	**94-3911**			1	
Earle Industries v NLRB	01/31/96	94-3843			1	
Doerfer Engineering v NLRB	**03/22/96**	**95-1376**			1	
Rosewood Care Center v NLRB	05/17/96	95-3172		1		
			TOTAL	1	3	0

Table 1, Page 3

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TABLE 1

COURTS OF APPEALS DECISIONS IN CASES INVOLVING NATIONAL LABOR RELATIONS BOARD UNFAIR LABOR PRACTICE ORDERS

July 1, 1995 - June 30, 1996

9th Circuit Cases						
NLRB v Sheet Metal Workers LU 104	**08/08/95**	**93-70753**	**150 LRRM 2071**		1	
NLRB v Unbelievable Inc	12/01/95	93-70236		1		
NLRB v Liston Brick of Corona Inc	**ND(LRRM 5/27/96)**	**90-70256**	**152 LRRM 2256**	1		
Tualatin Elec Inc v NLRB	05/29/96	93-70775, -70843	152 LRRM 2429			
California Pacific Medical Ctr v NLRB	**06/19/96**	**93-71039, -70009**	**152 LRRM 2593**	1		
			TOTAL	3	1	0
10th Circuit Cases						
Medite of NM v NLRB	**12/07/95**	**94-9575**		1		
NLRB v Oklahoma Fixture Co	03/28/96	95-9509			1	
Intermountain Rural Elec v NLRB	**04/22/96**	**95-9529**		1		
Ready-Mixed Concrete v NLRB	04/26/96	95-9533		1		
			TOTAL	3	1	0
11th Circuit Cases						
(none)						
			TOTAL	0	0	0
TOTAL				50	23	4
PERCENTAGE				64.9%	29.9%	05.2%

Table 1, Page 4

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TABLE 1

COURTS OF APPEALS DECISIONS IN CASES INVOLVING NATIONAL LABOR RELATIONS BOARD UNFAIR LABOR PRACTICE ORDERS, July 1, 1995 - June 30, 1996

Note: Kelley v NLRB involved timeliness of filing an unfair labor practice charge.

Note: ARA Services v. NLRB; no decision reported.

Note: NLRB v. Carolina Food Processors involved the legality of a subpoena.

Note: NLRB v. Electro-Voice involved an issue of injunctive relief by a district court.

TABLE 2

COURT DECISIONS INVOLVING REVIEW OF ARBITRATION AWARDS, July 1, 1995 - July 30, 1996

CASE	DATE	CITATION	COURT	VAC	UPHLD
Trinity Industries v United Steelworkers	7/20/95	149 LLRM 3050	US Dist Ct Norther Dist of Texas		1
Robinson v. National Railroad Passenger Corp & Transportation Workers Union of America Local 1460 Amtrack Service Workers Council	7/25/95	151 LRRM 2112	US Dist Ct. Southern Dist of New York		1
Shop N Save Warehouse Foods v. United Foods & Commercial Workers	7/31/95	149 LRRM 2978	US Ct of Appeals 8th Circ		1
United Auto, Aerospace & Ag Implement Workers v. Micro Mfg.	8/7/95	150 LRRM 2362	US Dist Ct East Dist of Michigan		1
Penn Terminals v Boilermakers	8/25/95	150 LRRM 2189	US Dist Ct Eastern Dist of Pennsylvania		1
Newspaper Drivers & Handlers v. Detroit Newspaper Agency	8/31/95	151 LRRM 2859	US Dist Ct Eastern Dist of Michigan		1
Total Warehouse Services v. Internl Bro of Teamsters, Chauffeurs, etc.	9/1/95	150 LRRM 2728	US Dist Ct Eastern District of Pennsylvania		1
Armco Employees Independent Federation v. Armco Steel Co	9/14/95	150 LRRM 2257	US CT of Appeals 6th Circ		1
Teamsters, Chauffeurs, Warehousemen v. Cargill	10/4/95	150 LRRM 2469	US CT of Appeals 8th Circ		1
Public Safety Employees Assn, et al v. State of Alaska	10/6/95	151 LRRM 2855	Alaska Supreme Court	1	
IBT v. Guardian Moving & Storage	10/19/95	151 LRRM 2159	US Dist Ct Southern Dist of NY		1
Columbia Aluminum Corp v. United Steelworkers	10/19/95	151 LRRM 2778	US Dist Ct Eastern Dist of Washington		1
Pennsylvania State Troopers Assn v Pennsylvania State Police	10/31/95	151 LRRM 2051	Pennsylvania Commonwealth Ct		1
Hotel Greystone Corp v. New York Hotel & Motel Trades Council, et al	11/2/95	152 LRRM 2061	US Dist Ct Southern Dist of New York		1
Civil Service Employees Assn, et al v. Schenectady County	11/9/95	152 LRRM 2575	NY Supreme Ct Appeallate Dic 3rd Dept		1
Oshkosh Paraprofessional Edu Assn v. Oshkosh School District	11/22/95	151 LRRM 2221	Wisconsin Ct of Appeals Dist II		1
United Food & Commercial Workers v. Foster Poultry Farms	12/6/95	151 LRRM 2013	US Ct of Appeals 9th Circ		1
Montgomery Ward 7 Co v. Warehouse, Mail Order, Office, etc.	12/6/95	151 LRRM 2586	US Dist Ct Northern Dist of Illinois		1
Houston Lighting & Power v. IBEW Local 66	12/11/95	151 LRRM 2020	US Ct of Appeals 5th Circ	1	
Gulf Coast Industrial Workers v. Exxon Co.	12/18/95	151 LRRM 2017	US Ct of Appeals 5th Circ	1	
Midwest Central Edu. Assn v. Illinois Edu. Labor Relations Board, et al	12/29/95	153 LRRM 2245	Illinois Appeallate Court 1st Dist 4th Div	1	
Dean Foods v. united Steel Workers	12/29/95	153 LRRM 2234	US Dist Ct Northern Dist of Indiana		1
Laborers Internl Union of No Amer v. O'Rourke Heavy Highway Co	1/8/96	151 LRRM 2348	US Dist Ct Eastern Dist of Missouri		1
Laborers Internl Union v. O'Rourke Heavy Hwy Co	1/8/96	151 LRRM 2348	US Dist Ct Eastern Dist of Missouri		1
Exxon Shipping v. Exxon Seaman's Union	1/11/96	151 LRRM 2161	US Ct of Appeals 3rd Circ		1
Arch of Illinois v. United Mine Workers	1/13/96	152 LRRM 2085	US Ct of Appeals 7th Circ		1
Soft Drink & Brewery Workers v. R&W Beverage	1/23/96	153 LRRM 1509	US Dist Ct Southern Dist of New York		1
Gas Co v. Oil, Chem & Atomic Workers Internl Union	2/26/96	151 LRRM 2600	US Ct of Appeals 4th Circ		1
Miller and AMF O'Hare Midway, et al v. Runyon & US Postal Serv	02/26/96	151 LRRM 2833	US Ct of Appeals 7th Circ		1
Internl Longshoremen, et al v. Steamship Trade Assn of Baltimore	02/28/96	151 LRRM 2771	US Dist Ct Dist of Maryland		1
Jasper Cabinet v. United Steelworkers, et al	02/29/96	151 LRRM 2651	US Ct of Appeals 7th Circ		1
Teamsters Local 312 v. Matlack, Inc.	03/04/96	151 LRRM 2784	US Dist Ct Eastern Dist of Pennsylvania	1	
United Auto, Aerospace & Ag Implement Workers v. Fruehauf	03/06/96	153 LRRM 1934	US Dist Ct Northern Dist of Illinois		1
Exxon Corp. v. Baton Rouge Oil & Chemical Workers Union	03/15/96	151 LRRM 2737	US Ct of Appeals 5th Circ	1	
Hogan v. Sutton Place South Owners, et al	03/29/96	152 LRRM 2114	US Dist Ct Southern Dist of NY		1
Houston Lighting & Power v. IBEW Local 66	04/01/96	153 LRRM 2379	US Dist Ct Southern Dist of Texas	1	

Table 2, Page 1

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TABLE 2

COURT DECISIONS INVOLVING REVIEW OF ARBITRATION AWARDS, July 1, 1995 - July 30, 1996

Keebler Co. v. Milk Drivers, et al	4/4/96	151 LRRM 3010	US Ct of Appeals 8th Circ	1	
City of Lorain, et al v. United Steelworkers	**4/10/96**	**153 LRRM 2732**	**Ohio Ct of Appeals 9th Jud Dist**		1
Round Valley Bd of Edu v. Round Valley Teachers Assn	4/29/96	152 LRRM 2085	California Supreme Court	1	
Ken American Resources v. United Mine Workers	**5/8/96**	**152 LRRM 2286**	**US Dist Ct Dist of Columbia**		1
Postville Community School Dist v. Billmeyer	5/22/96	152 LRRM 2401	Iowa Supreme Court		1
Teamsters v. Commercial Warehouse Co	**5/24/96**	**1523 LRRM 2347**	**US Ct of Appeals 8th Circ**		1
Blasters, Drillrunners & Miners v Laquilla Construction, et al	5/24/96	153 LRRM 2440	US Dist Ct Eastern Dist of New York		1
Great Atlantic & Pacific Tea Co v. Retail, Wholesale & Dept Store Un.	**5/28/96**	**152 Lrrm 2583**	**US Dist Ct Southern Dist of NY**		1
Sheet Metal Workers v. Madison Industries of Arizona	5/29/96	152 LRRM 2505	US CT of Appeals 9th Circ		1
Bridge, Structural & Ornamental Iron Workers v. Burtman Iron Works	**5/30/96**	**152 LRRM 2870**	**US Dist Ct Dist of Massachusetts**		1
			TOTALS	9	37
			AVERAGES	19.6%	80.4%

Table 2, Page 2

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LEGAL ISSUES IN HIGHER EDUCATION

B. A TALE OF TWO STATUTES
OR WHY PLAINTIFFS' ATTORNEY SHOULD AVOID THE AMERICANS WITH DISABILITIES ACT BUT UTILIZE THE FAMILY AND MEDICAL LEAVE ACT

Robert David Goodstein, Esq.
Goodstein & West

The following is written by a litigator, not a scholar. It is not intended to be exhaustive but impressionistic. It is merely a musing by an attorney who reads too many advance sheets and is afraid he detects an ominous trend. He hopes he is wrong and someone shows him the error of his paranoia. Still, as they say, "Just because you are paranoid doesn't mean they're not out to get you."

LUKE AND THE BAND TRAPPED IN THE TRASH COMPACTOR

Plaintiffs' attorneys in 1996 have viewed the Americans with Disabilities Act of 1990 (42 USC S12101 et seq.) as a godsend. This statute has been utilized by plaintiffs' attorneys in an effort to vindicate their clients' rights since it became effective on July 26, 1992. Plaintiffs' attorneys have memorized the standards applicable to potential plaintiffs to determine if a client is a member of the protected class. All together now, the term "disability" means an individual with "a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such impairment;[1] or being regarded as having such an impairment." Likewise, a "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that he or she holds or desires.[2]

Finally, the Americans with Disabilities Act outlaws discrimination against "a qualified individual with a disability."[3] Thus, it is obvious that to be a member of the protected class under the ADA, one must be qualified and one must have a "disability."

However, by interpreting the qualification standard restrictively while utilizing an impossible individualistic standard as to whether the impairment substantially limits one or more life activities, courts have rendered the ADA a dead letter.[4]

Impairments that plaintiffs' attorneys would have logically concluded would qualify as substantially limiting one or more major life activities have been summarily rejected by the courts. Thus in Ellison v. Software Spectrum Inc., 2 ADD para. 2-268 (5th Circuit 1996), the plaintiff established that she suffered from breast cancer and that her related treatments caused nausea, fatigue, swelling, inflammation and pain. However, the Court ruled that because the plaintiff had testified her ability to perform her job was not affected and her cancer treatments did not cause her to miss any work, she was not an individual with a "disability." Although plaintiff had requested and received modifications to her work schedule during her treatment, there was nothing in her employer's personnel file that indicated she was unable to perform her job.[5]

In Kocsis v. Multi-Care Management Inc., 6th Cir. 95-3507 October 15, 1996, a nurse who was diagnosed with multiple sclerosis was ruled not to be an individual with a disability pursuant to the ADA. Holding that plaintiff's doctors reported she was not limited in her activity, the court pointed out that Ms. Kocsis testified she never sought accommodation from the employer. Since the plaintiff worked through her disability, she was not "limited" by her disability, and thus could not claim protection under the ADA.[6]

The hostility of the courts towards plaintiffs bringing a cause of action pursuant to the ADA is pointed out in the recent decision Ouzts v. U.S.Air Inc., U.S. District Court Western District of Pennsylvania 94-625, decided July 26, 1996. In Ouzts, plaintiffs Betty Ouzts and Diane Pepke were reservation sale agents for U.S. Air. Both were diagnosed with repetitive stress traumas, including carpal tunnel syndrome. Ouzts underwent surgery and both Ouzts and Pepke saw various doctors. As an accommodation they requested a transfer to another available position not requiring repetitive motion. However, the court ruled that both plaintiffs failed to establish that their physical impairment "substantially limits" one or more major life activities. Although the court accepted that both plaintiffs had physical impairments as a result of carpal tunnel and related conditions, they were not "disabled" under the ADA. Holding that neither plaintiff was "significantly restricted" in her ability to care for herself or perform manual tasks, the court ruled that the impairment did not substantially limit one or more major life activities. Plaintiffs were able to make their own meals, run errands and go grocery shopping. While plaintiff Ouzts said she was unable to open heavy doors with her right hand, she was not significantly restricted in her ability to care for herself. Her testimony showed that there were few limitations on her ability to engage in daily activities. As no "reasonable jury" could find that plaintiffs were significantly restricted in a major life activity, the court ruled they were not disabled under the ADA.[7] Although other courts have held that carpal tunnel syndrome does qualify as substantially limiting one or more major life activities,[8] decisions such as the above clearly establish the prevailing attitude of the federal judiciary: if, and only if, the disability is severe is the employee protected pursuant to the ADA.

However, if the disability is severe, the other portion of the definition of "qualified individual with a disability" becomes applicable. Most individuals with severe disabilities have applied for and are receiving disability benefits pursuant to either State or Federal Social Security disability statutes. Utilizing the doctrine of "judicial estoppel", the courts have concluded that individuals who apply for and receive such benefits may not maintain a cause of action under the ADA and have granted summary judgment to employers. Thus, at a recent legal symposium sponsored by the American Society of Association Executives and as reported in BNA's Employment Discrimination Report, Christopher G. Bell of Jackson, Lewis, Schnitzler & Krupman remarked that "Congress did not integrate the ADA, FMLA, and Workers' Compensation Laws, but you have to integrate these laws."[9] Bell noted at this symposium that a majority of courts have held that employees do not have an ADA claim after filing for benefits based on the premise that they are totally disabled. He was quoted as stating, "Courts are saying that employees cannot speak out of both sides of their mouths."[10]

A recent article by NELA member Donald L. Sapir agreed: "A majority of federal courts considering the issue have held that an employee's application for disability benefits, in which he and his doctor have stated that the employee is "totally disabled," and unable to work, judicially estops the employee from later alleging in an ADA claim that, despite the disability, he is still able to perform the essential functions of the job."[11]

Recent cases from two different federal circuits have agreed with this position and applied judicial estoppel in ADA cases. In a case which is of paramount importance to those practitioners from New Jersey and Pennsylvania, McNemar v. Disney Store Inc.,[12] the Third Circuit affirmed a lower court decision which applied judicial estoppel to prevent the plaintiff from "playing fast and loose with the courts" and taking "inconsistent positions" regarding his ability to work. A Ninth Circuit decision, Kennedy v. Applause, Inc., resulted in a similar conclusion.[13]

In McNemar plaintiff was diagnosed as HIV-positive and missed 17 days of work. His district manager told plaintiff that she had heard rumors that was HIV-positive and offered her help. Plaintiff denied the rumors and declined assistance. A week later plaintiff took $2.00 from the cash register and asked another employee to buy cigarettes for him. He did not return the money and the other employee reported him to a Disney Loss Prevention Hotline as well as to the assistant manager. The assistant manager reported the infraction to the district manager.

After plaintiff admitted taking the money for personal use, he was immediately suspended and told that Disney headquarters in California would determine whether he should be fired. Plaintiff became very upset, apologized for taking the money, and divulged his HIV status. In California, Disney concluded that the plaintiff should not be penalized less severely than other employees in similar situations simply because of his HIV status and discharged him. Plaintiff quickly applied for and received disability benefits pursuant to both New Jersey and federal law. In a sworn statement filed to receive these and other benefits, he claimed to be disabled and unable to work. A doctor certified that he was disabled and unable to perform the duties of his job. A second doctor said that he was totally and permanently disabled.

McNemar sued Disney under the ADA. The district court granted summary judgment to the employer holding that he failed to establish a prima facie case of discrimination because he had admitted he was not qualified to perform his job. He was judicially estopped from claiming otherwise.

The Third Circuit held that judicial estoppel is an equitable doctrine that is intended "to protect the integrity of the courts" by preventing parties from assuming inconsistent positions. Citing a prior ruling of the Third Circuit in Ryan Operations G.P. v. Santium-Midwest Lumber Co., 81 F.3d 355,[14] the court said the test is whether the party's present position is inconsistent with the position previously asserted, and whether one or both of the positions was asserted in bad faith to play fast and loose with the courts. By asserting inconsistent positions regarding his ability to work, the circuit court concluded that the district court had acted well within its discretion in holding plaintiff was estopped from arguing he was qualified under the ADA. Plaintiff had told federal and state agencies he was totally disabled and unable to work, and he was now claiming he was qualified and could perform the essential elements of the job in order to procure relief pursuant to the ADA. This, the court ruled, was impermissible.[15]

In the Ninth Circuit case, plaintiff was diagnosed with chronic fatigue syndrome and was certified by her doctor as being disabled from work. She applied for state and Social Security disability benefits. Predicated upon her sworn statements on her disability benefit application and her doctor's statements, the district court concluded that plaintiff was totally disabled and thus was not a qualified individual pursuant to S12111(8). In her appeal to the Ninth Circuit, plaintiff argued that a factual dispute existed about the extent of her disability and therefore about her ability to perform the essential functions of the job. She cited the fact that the Social Security Administration had denied her job benefit claim with its determination that she had the ability to return to work. However, the court ruled that her statements on the disability benefits form which was corroborated by her doctor's assessment controlled so plaintiff was not protected by the ADA.[16]

Two recent federal district courts in New York have reached opposite results regarding the applicability of judicial estoppel; Mohamed v. Marriot International Inc., 944 F.Supp. 277 (S.D.N.Y. 1996) and Simon v. Safe Light Glass Corp., 943 F.Supp. 261 (E.D.N.Y. Oct. 28, 1996).

In Mohamed the plaintiff applied for Social Security Disability Insurance benefits on or about July 22, 1994. When he applied for these benefits, he stated "I became unable to work because of my disabling condition on October 1, 1993." Additionally, he stated "I have tried to get another job with the help of OVR (Office of Vocational Rehabilitation), but I have been frustrated any place I look. They ask for a resume and say that they will contact me. There is not enough jobs open now." Based on this fact pattern, the court cited to the fact that the Social Security Administration issued a (pamphlet dated January 1996 which addressed the possibility of receiving disability benefits, at least for a limited time period, while working. (See pamphlet entitled "Social Security: Working While Disabled: How We Can Help You"). Further, under the Social Security Act a person is entitled to benefits only if his impairments are "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience engage in any other kind of gainful work which exists in the national economy. ...Work which exists in the national economy means work which exists in significant numbers either in the region where such individual lives or in several regions of the country." Thus, the Mohamed Court concluded that an individual may be disabled for the purposes of receiving SSDI benefits because few jobs exist which he might perform, but still be within the A.D.A.'s protected class, because the particular job in which he has an interest could be modified to accommodate his disability.

However, federal district courts have held the doctrine of judicial estoppel is established pursuant to the decision to seek and receive New York State Disability Insurance, not SSDI. As Judge Rakoff of this court decided in Bonnano v. Gannett Company, 934 F.Supp. 113, 115, plaintiff's claim to be a "qualified individual under the A.D.A." is "totally at variance with the unequivocal formal representations he made to (defendant) and others (including New York State) in connection with this application and appeals for long term disability benefits."

In Simon the court set forth the reasoned analysis of the basis of judicial estoppel. The court stated that the doctrine of judicial estoppel is aimed at preventing "a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by him in a prior legal proceeding." The Simon Court then asked: "What is meant by 'legal proceedings' and do those words embrace any proceeding administrative, quasi-judicial, in which a 'sworn position' is taken." After analyzing the respective cases, Judge Glaser decided that judicial estoppel was applicable to administrative and quasi-judicial proceedings. Concluding that the fact that the choice between obtaining federal or state disability benefits and suing under the A.D.A. is a difficult one, the court, nevertheless, held that this difficulty does not entitle one to make false representations with impunity. Nothing grants a person the authority to flout the exhaulted status that the law accords statements made under oath or penalty of perjury.

The Court then determined that Workers' Compensation proceedings were equivalent to judicial proceedings. Concluding that plaintiff Simon is the paradigmatic judicial estoppel plaintiff, the Court found he had played fast and loose with the system, arguing "whatever state of facts seems advantageous at a point in time, and a contrary state whenever self-interest may dictate a change."

EEOC has realized that the doctrine of judicial estoppel will bar those individuals who have the most severe disabilities from claiming protection pursuant to the ADA. Thus, in Harris v. Marathon Oil, a case presently before the Fifth Circuit Court of Appeals, EEOC submitted a brief which argued that "while statements made on a disability benefit application may be relevant as impeachment evidence on the issue of qualifications (and may, in appropriate cases, have some bearing on the award of make whole relief to the plaintiff), such statement should not pose an absolute bar to an employee's ADA action where the evidence otherwise supports a finding that the employee is a 'qualified individual' within the meaning of the ADA."[17]

Thus, plaintiffs in the Third and Ninth Circuit may feel like Luke Skywalker and his intrepid band trapped in the trash compactor with no way out. On one hand, the courts have required that the physical or mental impairment be very severe to comport with the requirement that it substantially limits one or more major life activities. However, if economic realities have forced an individual with severe impairments to apply for either Social Security disability and/or state disability, the individual is barred by judicial estoppel from asserting a claim under the ADA as a "qualified individual with a disability."[18] As the walls of the trash compactor close in, no one is left standing in-between.

THE ROAD TO HELL IS PAVED WITH GOOD INTENTIONS

The Family and Medical Leave Act of 1993 (29 USC S2601 et seq.) is unique among acts litigated by plaintiffs' attorneys. IT IS THE ONLY EMPLOYEE PROTECTION CIVIL RIGHTS STATUTE WHERE INTENT IS NOT REQUIRED. The only questions under the Act are whether the employee is an eligible employee, whether the employee is entitled to leave, and whether the employee has been restored by the employer to the position of employment he or she held when the leave commenced. To plaintiffs' attorneys these are very easy facts to prove.

An eligible employee is any employee who has been employed for at least 12 months by the same employer, and who has worked a total of at least 1,250 hours of service with such an employer during the previous 12 month period.[19] However, "small employers" who employ less than 50 employees in a 75 mile radius of the work site are exempt from the Act's provisions.[20]

An eligible employee is entitled to a total of 12 work weeks of leave during any 12 month period for any of the following: (a) because of the birth of a son or daughter of the employee, and in order to care for such son or daughter; (b) because of the placement of a son or daughter with the employee for adoption or foster care; (c) in order to care for a spouse, or a son, daughter, or parent of the employee if such spouse, son, daughter or parent has a serious health condition; (d) because of a serious health condition that makes the employee unable to perform the functions of the position of such an employee.[21] An employee who takes such leave shall be entitled on return from such leave to be restored by the employer to the position of employment held by the employee when the leave commenced; or to be restored to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment.[22]

Thus, the basic statutory framework is very clear. If you have worked over one year for the same employer, and that employer employs 50 or more people at your work site or within a 75 mile radius of your work site, and you are a full-time employee or have worked more than 1,250 hours in the last 12 months, you are entitled to a 12 week leave of absence for certain specified reasons. If you are on this leave of absence your position is guaranteed to you. You must be returned to that position or you must be given an alternative position with equivalent benefits and other terms and conditions of employment.

It is obvious from the above that definitional issues exist pursuant to the FMLA. The definition of a serious health condition is NOT as stringent as the ADA's definition of disability. A serious health condition under the FMLA involves either (1) an overnight stay in a hospital, hospice or residential medical care facility or (2) continuing treatment by a health care provider.[23] In turn, continuing treatment by a health care provider means any of the following: a period of incapacity (inability to work, go to school, or perform regular daily activities) of more than three consecutive calendar days and any subsequent treatment or period of incapacity related to the same condition that involves either treatment two or more times by a health care provider, or treatment at least once by a health care provider and continuing treatment under the supervision of the health care provider; any period of incapacity for pregnancy or prenatal care; any period of incapacity due to a chronic serious health condition; a permanent or long term incapacity for which there is no effective treatment; or any period of absence for multiple treatments of an injury or other condition that would result in an absence of more than three days if not treated (examples include cancer, kidney disease or severe arthritis).[24]

How does this affect the plaintiffs' attorney? From the above it is obvious that it is fairly easy to establish that the plaintiff is a member of the class protected by the Family and Medical Leave Act. Also, it is fairly obvious that the employee is entitled to 12 weeks of leave and that the employee's job is guaranteed if she/he returns to work within that period. However, if the employer fails to properly and timely designate absence as FMLA leave time taken, it will not count against the employee's 12 week entitlement.[25] The employee is still entitled to all the protections of the Act including the right of reinstatement, even if she/he is out for years.

It is my belief that many employers in New York, Connecticut, New Jersey and Pennsylvania who are covered by the FMLA have failed to properly designate time taken as FMLA leave. Thus, they are unable to either discipline or terminate the employee. The employee is absolutely protected. The FMLA makes it unlawful for an employer to interfere with, restrain or deny the exercise of, or the attempt to exercise any right provided under this title.[26] This includes the right of restoration.[27]

Over 20 years ago, the New York State Court of Appeals, the highest appellate tribunal in New York, wrote the following: "Discrimination today is rarely so obvious or its practices so overt that recognition of the fact is instant and conclusive. 'One intent on violating the law against discrimination can not be expected to declare or announce his purpose. Far more likely is it that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive - for we deal with an area in which subtleties of conduct...play no small part'."[28] Plaintiffs' attorneys have realized the difficulty of proving discrimination and have met that challenge with various degrees of success. However, the FMLA is a perfect tool for plaintiffs' attorneys. Intent is irrelevant. The employer could have the best of all possible intents but by failing to follow the strictures of the Act is plunged into the hell of litigation and liability. Public employers who for many years have mistreated their employees by disciplining them for utilizing legitimate sick time, will no longer be allowed to continue this pernicious practice.[29] Unlike the ADA, the FMLA seems to be a source of statutory protection for employees that has been underlitigated. This statute seems ripe for expansion and future litigation to vindicate employee rights.

ENDNOTES

1. 42 USC S12102(2).

2. 42 USC S12111(8).

3. 42 USC S12112(a).

4. Although only the language contained with 42 USC S12102.2(A) requires that the impairment substantially limit one or more major life functions, courts have concluded that the record of such an impairment or being regarded as having such an impairment requires that the language of 2(A) be read into 2(B) and 2(C). See Ennis v. National Ass'n of Business and Educational Radio, 53 F. 3d 55 (4th Cir. 1995).

5. Ellison v. Software Spectrum Inc., ____F.3d_____2ADD para. 2-268, (5th Cir. 1996).

6. Kocsis v. Multi-Care Management Inc., ____F.3d____(6th Cir. 95-3507, October 15, 1996).

7. Ouzts v. U.S. Air Inc., ____F.Supp.____(DCWP 94-625 July 26, 1996).

8. See EEOC v. Joslyn Manufacturing Co., ____F.Supp.____(DC NI11 95-C-4956, July 11, 1996); Feliberty v. Fenger Corp., ____F.3d_____(7th Cir., 95-1724; October 16, 1996).

9. Employment Discrimination Report, Vol. 7, No. 16, October 23, 1996 at p. 504.

10. Ibid.

11. Donald L. Sapir, "Should ADA rights be defeated by an application for disability benefits." New York State Bar Labor and Employment Section Newsletter Vol. 20 No. 4 (December 1995) p. 21 and the cases cited therein.

12. McNemar v. Disney Store Inc.____F.3d____(3rd Cir. 95-1590, July 31, 1996).

13. Kennedy v. Applause Inc., _____F.3d_____(9th Cir. 95-5501/55549; July 31, 1996).

14. Ryan Operations G.P. v. Santium-Midwest Lumber Co., 81 F.3d 355 (Third Cir. 1996).

15. McNemar v. Disney Store Inc., ___F.3d___ (3rd Cir. 95-1590; July 31, 1996). In its recently issued (February 12, 1997) Enforcement Guidance on Disability Representatives, the Commission rejected the concept of judicial estoppel, arguing that the ADA's purposes and standards are fundamentally different than the other states, the Commission cited Mohamed v. Marriot International Inc., 944 F.Supp. 277 (SDNY 1996) and criticized McNemar as ignoring the fundamental difference between ADA and SSA. However, on February 18, 1997 the Supreme Court denied review of McNemar (96-966).

16. Kennedy v. Applause Inc., ____F.3d____(July 31, 1996).

17. Employment Discrimination Report Vol. 7 No. 18 (November 6, 1996) at 566.

18. In the Second Circuit, the leading decision on judicial estoppel is Bates v. Long Island R.R. Co., 997 F.2d 10298 (2nd Cir. 1993). In Bates, the Circuit concluded that two elements must be established to prove judicial estoppel: "First, the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the Court in some manner." (emphasis added) As Social Security and state disability benefits are determined by administrative agencies, not by courts, one could argue that the preclusive effect may be different. However, this requirement seems to focus on "success" in the prior proceeding not the forum. See Bates Note 5:

> "The Second Circuit follows the majority view with respect to the second element of judicial estoppel. See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Georgiadis, 903 F. 2d 109, 114 (2d Cir. 1990)."
>
> "Under the minority view, judicial estoppel has been applied notwith-standing that a party was not successful in asserting its position in the prior judicial proceeding, if the court determines that the alleged offending party engaged in 'fast and loose' behavior which undermined the integrity of the court." See Stevens Technical Services Inc. v. SS Brooklyn, 885 F.2d 584, 589 (9th Cir. 1989)."

19. 29 USC S2611(2)(A).

20. 29 USC S2611(2) (B)(ii).

21. 29 USC S2612(1).

22. 29 USC SS2614(1)(A) and (B).

23. 29 CFR S825114.

24. 29 CFR S825.114(a) (2) See Freeman v. Foley, ____F.Supp.____(DC N Ill, 95C 209 September 267, 1996. A chronic serious health condition is one that either (1) requires periodic visits to a health care provider, (2) continues over a long period of time, or (3) may cause episodic incapacity, i.e., asthma, diabetes and epilepsy 29 CFR 114 (a) (2) (iii). But see Sakellarion v. Judge & Dolph, 893 F.Supp. 800 (ND Ill 1995).

25. 29 CFR SS825.208(c), 825.208(e).

26. 29 USC S2615(a) (1).

27. Freeman v. Foley, _____F.Supp.____(DC NIl1 95 C 209 September 26, 1996).

28. Div. of Human Rights v. Kilian MFG, 35 NY2D 206, 209 (1974).

29. See for example, DeStefano v. Village of Port Chester, 211 A.D. 2d 716 (2nd Dept. 1995); Juan v. County of Suffolk, 209 A.D.2d 523 (2nd Dept. 1994)

LEGAL ISSUES IN HIGHER EDUCATION

C. COMPLIANCE WITH THE FAMILY AND MEDICAL LEAVE ACT AND THE AMERICANS WITH DISABILITIES ACT: ISSUES FOR COLLEGE FACULTY

Barbara A. Lee
Professor of Human Resource Management
Rutgers University

Two major pieces of federal employment regulatory law went into effect within roughly a twelve month period -- the Americans with Disabilities Act (ADA), which became effective on July 26, 1992, and the Family and Medical Leave Act (FMLA), which became effective on August 5, 1993. Both laws are designed to assist workers with their own, or a close relative's, serious health condition without losing their jobs. The laws operate very differently, however, and interact in some ways that are somewhat contradictory.

Colleges and universities are not exempt from either law, and the laws raise difficult issues for both faculty and nonfaculty employees. Both laws have engendered enforcement activity and litigation against business organizations; only a few lawsuits have been litigated to conclusion against colleges and universities under these laws. Although issues respecting a nonfaculty staff member would be similar to those in most business organizations, the unique role played by college faculty, and a lack of accountability for faculty time at many institutions, raise special issues when these laws are applied to teaching faculty.

This paper will examine the implications for both the ADA and the FMLA as applied to a college's teaching faculty. Very brief overviews of each law will be given, as well a brief summary of the range of issues that has been litigated in the context of business organizations. Then a series of issues raised by both laws for faculty work will be discussed. Finally, a set of recommendations will be offered for institutional policies and practices in light of the requirements of these laws.

THE ADA AND COLLEGE FACULTY

The Americans With Disabilities Act (42 U.S.C. S12101-12213) forbids discrimination on the basis of disability if the employee meets the statutory definitions. The individual must have a physical or mental impairment that "substantially limits one or more of the major life activities of such individual," "a record of such an impairment," or must be "regarded as having such an impairment" (42 USC S12102(2)). Thus, the individual does not necessarily have to have an impairment to be protected by the law if she or he can demonstrate that the alleged discrimination occurred because the individual had previously been impaired (for example, an individual whose cancer is in remission) or because the individual, although not impaired, was regarded as disabled (for example, an asymptomatic individual who is HIV positive).

If the impairment meets the statutory definition, then the individual must demonstrate that he or she is a "qualified individual with a disability," in that he or she can perform the "essential functions" of the job with or without reasonable accommodation. The Interpretive Guidance accompanying the ADA regulations states that, ordinarily, the employer's determination of the essential functions of a position would control, but it may be an issue of fact if one or more essential functions are disputed by the parties. Written job descriptions are a source of evidence, but not necessarily dispositive of the issue.

If the individual is deemed to be "qualified," then the employer must determine if a "reasonable accommodation" exists that will enable the individual to perform the job. The law does not define reasonable accommodation, but provides examples: job restructuring, part-time or modified work schedules, reassignment to a vacant position, modification of training or examinations, or of the work area, providing readers or interpreters, or providing equipment that will enable the individual to do the job.

The boundary of reasonableness is "undue hardship." If the employer can demonstrate that the proposed accommodation is very expensive, is very disruptive, or a safety hazard, then the accommodation is not reasonable. Again, the law gives no definition of undue hardship, but suggests that the employer's size, financial resources, and type of business will be considered. If a safety defense is used, the employer must demonstrate that the employee is a "direct threat" to the safety of others or to him- or herself.

Individuals suing under the ADA often include claims under the FMLA if the employer either refused to grant a requested disability leave, or refused to reinstate the employee (or terminated the employee) upon return from the leave. The laws interact in a variety of ways; colleges may face complex issues when a faculty member, for example, asserts the need for a leave of absence because of a disability, but later requests to be returned to his or her former teaching position (see, for example, Wagner v. Texas A&M University, 1996).

LITIGATION ISSUES

Before a plaintiff states a claim under the ADA, he or she must establish, as a threshold issue, that the claimed impairment meets the statutory definition of "disability." Although both Congress and the Equal Employment Opportunity Commission have recognized a wide range of conditions as qualifying for protection, the regulations that interpret the ADA state that the impairment must substantially limit the individual's ability to work in a wide range of jobs or in an entire occupation, rather than simply interfering with one particular job. This showing has been difficult for many plaintiffs to make. For example, in Schwartz v. Northwest Iowa Community College (1995), a library clerk with a visual disorder, night blindness, challenged the college's decision to transfer her to the night shift. The court said that her disorder did not meet the statutory definition because the impairment did not affect her ability to work, but only to drive at night. For that reason, she did not meet the statutory definition of "substantially limited." Similarly, a supervisor with diabetes whose vision was impaired as a result of that disorder did not meet the statutory definition, according to the trial court, because she could perform, the tasks of nonsupervisory positions within the same company (Schluter v. Industrial Coils Inc., 1996). And a grocery store cashier with repetitive motion disorder failed to state an ADA claim because she presented evidence only with respect to her inability to perform her own job, not a broad range of jobs (Taylor v. Albertsons, 1996).

With respect to the issue of whether an individual is "qualified," courts have shown substantial deference to the employer's determination of essential functions. This is particularly true for cases in which the plaintiff has been discharged for misconduct or excessive absences and claims that the problem behavior is directly related to a protected disability. These arguments are typically unavailing. For example, in Mancini v. General Electric (1993), the court upheld the discharge of a production worker with "emotional problems" who was insubordinate, saying that the ability to follow orders is an essential function of his job. In Larkins v. Ciba Vision Corp. (1994), a trial court determined that a customer service representative with panic disorder who could not deal with the public was unqualified because public contact was an essential function of her job. With respect to attendance, several courts have ruled that regular, predictable attendance is an essential function of a variety of jobs. For example, in Tyndall v. National Education Center (1994), a federal appellate court denied the discrimination claim of a faculty member who had missed forty days of work over a seven-month period because of problems related to lupus, stating that regular attendance was an essential function. Similar results obtained in Jackson v. Veterans Administration (1994), where the court asserted that the employee's presence on a routine basis was an essential element of the job. Even if the plaintiff argues that he or she should be allowed to work at home as a reasonable accommodation, many courts have disagreed, particularly for the employees whose work must either be closely supervised or who work as a team (see, for example, Whillock v. Delta Air Lines, Inc., 1995).

Most cases litigated under the ADA have turned on these two issues: is the disability covered by the law, and is the employee "qualified" under the statutory language. The previous discussion shows evidence of rather narrow interpretations of the law by a variety of federal courts: a large proportion of plaintiffs have been unable to meet the threshold requirement that their condition by "substantially limiting," even if the disorder itself qualifies for ADA protection (such as diabetes, epilepsy, or psychiatric disorders such as panic disorders).

ISSUES FOR FACULTY

Although most colleges and universities have been subject to the Rehabilitation Act since 1972, litigation by faculty was infrequent under this law. The pace has quickened somewhat, and those institutions that do not "regulate" faculty work time or specify faculty responsibilities in the same way that they regulate staff work time and responsibilities may face difficult issues under both the ADA and the FMLA.

One important issue is determining the essential functions a faculty member (Edwards 1992-93). If the college has written job descriptions or individual contracts stating the number of courses the faculty member is expected to teach, this will help establish the essential functions of the faculty member. Some institutions have been faced with challenges by disabled faculty who argue that they can conduct research at home, but cannot teach because of their disability. Because faculty at many colleges perform a variety of functions, it is important to establish that classroom teaching is expected of the faculty and is an essential function. For example, in Motzkin v. Trustees of Boston University (1996), the plaintiff argued that he should be accommodated by being reassigned from teaching to full-time research. Fortunately for the college, it had a written contract with the professor that specified the number of courses he was to teach, and there was evidence that there was no expectation that he conduct research or publish. On the other hand, if research and publication are an essential function of a faculty member's job (as they clearly are at research and doctoral-granting institutions), the faculty member with psychiatric problems that prevent him or her from concentrating, or from being creative, or from engaging in other forms of scholarship would not be "qualified" under the law's definition. Of course, the college would have to provide evidence that it enforced the research or scholarship requirement consistently across all the faculty; to do so only for the disabled faculty member would violate the ADA.

Other issues revolve around the concept of reasonable accommodation in an academic setting. At many institutions, faculty "close ranks" if one of their colleagues must miss one, or even several, classes. Collective bargaining agreements may have provisions for staffing courses if the instructor cannot fulfill his or her teaching obligations. It may be a different matter, however, if a faculty member is consistently late for class, or cancels class several times during a semester, without disclosing a disability. A court might determine that, if the faculty member does not meet his or her classes, the "qualified" standard is not met even if the behavior is related to a disability. Another potentially difficult issue may arise if an untenured faculty member requests an extension of the probationary period because her psychiatric disorder slows down her scholarly productivity. If the college gives probationary faculty a leave of absence for other types of disorders or short-term disabilities (such as childbirth or parental leave), it may be difficult for the college to argue that it cannot do so for the probationary faculty member with a psychiatric disorder. But if this faculty member wants a paid extension of the tenure clock, the college may argue the undue hardship defense.

In a few recent cases, faculty members have defended themselves against discipline or discharge for sexual harassment by claiming that their disability caused the behavior and thus must be accommodated. For example, in Winston v. Maine Technical College System (1993), a tenured faculty member was dismissed for sexually harassing a student. His claim that an obsessive disorder impaired his control over his behavior was rejected by the court, which ruled that this "impairment" was not a disability for ADA purposes. And in Motzkin v. Trustees of Boston University (1996), the plaintiff claimed that medication that he was taking for a "depressive disorder" reduced his inhibitions and impaired his judgment. The court upheld his discharge, stating that, even if his "disorder" was a disability, he had been terminated for unprofessional conduct before the University had any notice of the purported disability. Even if he could demonstrate that he was disabled, said the court, he was not qualified under the statute's definition because his disability made him incapable of teaching, since he would be in close proximity to female students, the targets of his assaults other misconduct.

These cases raise a series of issues for faculty and administrators to consider. Are all faculty expected to teach? Is the college able to reassign faculty who cannot teach because of a documented disability that meets the statute's definition?

On the other hand, is teaching an essential function, and thus the faculty member who could not teach, even with accommodation, would not meet the statutory definition of a "qualified individual with a disability?" How does the college respond to faculty who are late for class, or who cancel several class sessions? Is meeting one's class regularly an essential function of the faculty member's job? Is civil behavior to one's faculty colleagues, to students, and to staff an essential function of the job? If the academic unit offers courses at night and a certain faculty member claims that teaching at night is incompatible with some disorder, what will the decision be? Although some institutions have grappled with these issues, many others have not, and doing so in the context of potential litigation makes resolution of these issues even more difficult.

It is unlikely that ADA litigation by faculty will proliferate. Most faculty have relatively flexible schedules (except for assigned times for teaching), which enables them to avoid some of the problems that business organizations have encountered. But those institutions that have faced litigation have found a sympathetic ear from the courts if they could establish what the essential functions of a faculty member were, and demonstrate that the faculty member simply could not perform them.

THE FMLA AND COLLEGE FACULTY

The Family and Medical Leave Act (29 U.S.C. S2601 et seq.) is designed to provide up to 12 weeks of leave per year, for employees who meet the law's eligibility requirements, for the employee to deal with his or her own serious health condition or that of a close family member. The leave may also be taken to care for a newborn, a newly-placed foster child, or a newly adopted child. Unlike the ADA, the FMLA requires that the employee who requests leave for his or her own serious health condition demonstrate that he or she cannot perform the job for documented health reasons. If the employee takes leave to care for a family member, that individual's serious health condition must be documented. The employer must continue the employee's medical benefits, and the employee has the right to reinstatement upon return from the leave. Only those employers with 50 or more employees are subject to the FMLA; colleges and universities clearly are in the group of organizations that must comply.

Extensive regulations have been enacted to interpret the FMLA and to clarify its definitions and the standards that both employers and employees must meet (29 C.F.R. Part 825) (Bayer, Kanter and Shpiece 1996). Employees who believe that their employer has violated the FMLA may file a claim with the Department of Justice or pursue a lawsuit in federal court.

LITIGATION ISSUES

Given the recency of the law, early litigation, which has been relatively sparse (Gitnik 1996, p. 312), has focused primarily on procedural issues: what the employee has to show to establish a *prima facie* case of an FMLA violation, whether the employee must advise the employer that a leave is for FMLA purposes, what form of notice to the employer must be given by the employee, etc. The definition of a "serious health condition" has also preoccupied the courts.

In Manuel v. Westlake Polymers Corp. (1995), the appellate court addressed the interaction of the FMLA with corporate "no fault" attendance policies, in which a specific number of absences is permitted -- for any reason -- but absences beyond that number result in discipline or discharge, whether the absence was justified or not. Although the court remanded the case for further proceedings at the trial level, its ruling suggests that "no fault" absence policies are incompatible with the FMLA because an employee could be disciplined for using a statutorily-protected leave entitlement (Aalberts and Seidman 1996). On the other hand, a federal trial court ruled, in Reich v. Midwest Plastic Engineering, Inc. (1995) that an employee who does not provide appropriate notice of the need to take FMLA leave, and who does not report the status of her need for leave upon the employer's reasonable request, is not protected by the law.

Evidence is mounting that the federal courts are interpreting fairly narrowly the law's requirement that the employee or a family member have a "serious health condition." For example, in Seidle v. Provident Mutual Life Insurance (1994), a federal trial court ruled that a child's ear infection was not a "serious health condition" under the law's definition. Similarly, in Hott v. VDO Yazaki Corp. (1996), another federal trial court ruled that a child's sinobronchitis did not meet the law's definition of a serious health condition. According to one pair of commentators, the courts are requiring that the condition be "debilitating," either for the employee or the family member, before the statutory entitlement to leave will be triggered (Alberts and Seidman 1996).

ISSUES FOR FACULTY

A faculty member could request, and be entitled to, FMLA leave for his or her own serious health condition, or to care for a seriously ill family member or a newborn, newly-adopted, or newly-placed foster child (Flygare 1995). In the former case, where the faculty member's own health is at issue, the college may have well-developed policies regarding disability leave, the closing of ranks etc. It is likely that many colleges' leave policies for faculty are more generous than the provisions of the FMLA, both with respect to the length of the leave and the fact that the faculty member still receives compensation while on disability leave. For those colleges without such policies, however, the 12-week entitlement may pose a problem if the request does not coincide with an academic semester or quarter, but is made midway through a faculty member's teaching assignment. This problem is no different, however, from the issues that colleges have faced for decades when faculty members fall ill, give birth, or are injured and cannot perform their duties.

The law provides for "reduced" or "intermittent leave," both of which allow the faculty member to take several hours, or several days, of leave per week to receive treatment for a serious health condition, or simply because a doctor has recommended a part-time work schedule because of a serious health condition. Depending upon the faculty-member's schedule, teaching and other obligations, reduced or intermittent leave may not interfere with his or her duties, or may interfere with only part of the faculty member's obligations. On the other hand, if the intermittent leave is used for treatment that can only occur at the same time as a faculty member's assigned class, taking such leave may result in reducing the faculty member's teaching obligations or eliminating them entirely for the period of the intermittent leave. Because of the manner in which intermittent leave is calculated, this may extend for far longer than twelve weeks the period during which the faculty member is not working full-time. For example, if the faculty member took intermittent leave of three days per week, the period of entitlement could stretch to twenty weeks rather than to twelve, since the leave is collided in hours and days.

Given the calculations that the employer must perform to ascertain 1) whether an employee is eligible for FMLA leave, 2) how long the employee is entitled to be on leave, and 3) how much reduced or intermittent leave an employee has taken, colleges that do not presently maintain attendance records for faculty may need to do so. At many colleges, as long as faculty meet their teaching, research, and governance obligations, no formal records are kept of their attendance or the hours that they are on campus. When a faculty member requests FMLA leave, however, particularly if the request is for reduced or intermittent leave, recordkeeping becomes more important. It is unlikely that department heads or deans will engage in this task spontaneously; training may have to be conducted for these "supervisors" so that they understand the college's obligations under the FMLA, particularly its recordkeeping obligations.

INTERACTION BETWEEN THE ADA AND THE FMLA

Colleges that afford an employee -- whether faculty or staff -- the statutory twelve weeks of leave for a serious health condition may still have obligations under the ADA. If the individual's "serious health condition" is also a disability under the ADA, the employee may be entitled to reasonable accommodation, which could include additional time off for treatment or recovery. Although an employer might attempt to assert that any leave in addition to the full FMLA leave poses an "undue hardship," commentators have argued that such an assertion would actually burden employees who had legitimately exercised their FMLA rights, and thus would constitute retaliation (Gitnik 1996).

In addition, two different federal agencies enforce the two laws: the ADA is enforced by the EEOC, and the FMLA is enforced by the Department of Justice. This situation could lead to the anomaly that an employer could be found in violation of both laws by the different agencies, or an action that was lawful under one law could violate the other law. For example, an employer could refuse to accommodate an employee because that employee's impairment does not meet the definition of "disability" in that it does not limit the individual's ability to work, yet the impairment is a short-term, but serious health condition that entitles the worker to leave under the FMLA. The laws may have similar purposes, but their interpretation, definitions, requirements, and enforcement are different, and can be confusing to inexperienced employers.

CONCLUSION

The ADA has resulted in many complaints of disability discrimination in general, but few against colleges and universitiether hand, there have been relatively few FMLA claims, and most have been resolved out litigation. One reason for the low rate of litigation may be that, since the leave is typically unpaid, few employees can afford to take the leave. One survey, conducted for the U.S. Department of Labor, found that only about 4 percent of eligible workers had taken FMLA leave (Geisel 1995; Commission on Leave 1996).

Should Congress amend the law to require that the leave be paid, as some scholars have recommended (Wever 1996), the use of such leave, and ensuing litigation, may increase. Until then, however, it appears unlikely that the law will engender the amount and complexity of litigation that the ADA has (Lee and Thompson, in press). And even if the law remains in its present form, it will continue to pose challenges for all employers, including colleges and universities, as they seek to conform to its requirements, the requirements of the ADA, and their increasing need to manage the academic enterprise efficiently and effectively.

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LEGAL ISSUES IN HIGHER EDUCATION

D. SIGNIFICANT LEGAL DEVELOPMENTS AFFECTING HIGHER EDUCATION, 1996-1997

James L. Cowden, Esq.
Strokoff & Cowden, P.C., Harrisburg, PA
Counsel for the Association of Pennsylvania
State College and University Faculties

It should be noted at the outset, that although I delivered this paper in April, 1997, this paper has been updated to reflect the decision of the United States Supreme Court on June 9, 1997, in Gilbert v. Homar, 117 S.Ct. 1807 (1997) reversing the decision of the United States Court of Appeals for the Third Circuit.

In Gilbert v. Homar, 117 S.Ct. 1807 (1997), the United States Supreme Court unanimously reversed the decision of the Court of Appeals for the Third Circuit in a case interpreting Cleveland Board of Education v. Laudermill, 470 U.S. 532 (1985), the Court's landmark decision on public employee due process rights. In Laudermill the Court held that a public employee with a property interest in his job could be dismissed for cause only if first given a pre-termination hearing. In Gilbert v. Homar, the Court refused to extend the right to a hearing to a disciplinary suspension case. East Stroudsburg University, an institution of the Pennsylvania State System of Higher Education, had suspended Homar, one of its police officers, without pay and without a hearing, upon learning that he had been charged with possession of marijuana, possession with intent to deliver and criminal conspiracy to violate the controlled substances law. The arrest occurred on August 26. The criminal charges were dismissed on September 1, but the university refused immediately to reinstate Homar. On September 18, Homar was provided with an opportunity to present his side of the story to university officials. On September 23 he was notified that he could return to work, but that he had been demoted from police officer to groundskeeper, and that he would receive back pay from the date of the suspension at the groundskeeper's rate. Later, the University paid the back pay at the police officer rate. The stated reason for the demotion was that Homar had admitted to the police who arrested him that he knew that the people he was associating with were involved with drugs.

The Third Circuit had ruled that a suspension without pay and without a pre-disciplinary hearing violated Homar's right to due process of law. It based its decision primarily on dicta in the Laudermill case which stated that,

> In those situations where the employer perceives a significant hazard in keeping the employee on the job [until a pre-disciplinary hearing can be held] it can avoid the problem by suspending with pay.

The Supreme Court, emphasizing what it called a need for due process flexibility, found that no pre-disciplinary hearing was required in this case. In applying a balancing test, the Court emphasized that Homar was facing only a temporary suspension, rather than a termination as in Laudermill, and actually received a relatively prompt post-suspension hearing. The Court also noted that the state has a "significant interest" in immediately suspending an employee against whom felony charges have been filed, especially an employee who is a police officer. But perhaps most significantly, the Court pointed out that the purpose of a pre-suspension hearing being to assure that there are reasonable grounds to support the suspension, in an arrest situation, the mere fact of the arrest and the filing of charges establishes reasonable grounds to support the suspension.

Decisions of the United States Courts of Appeals for the Fifth and Eleventh Circuits show divergent views on application of Title IX of the Education Amendments. Simply stated, Title IX bars sex discrimination by educational institutions that receive Federal funds. A school violates Title IX if it discriminates on the basis of sex, but there has been an open question as to the school's liability if students discriminate against one another. In Davis v. Monroe County Board of Education, 74 F.3d 1186 (11th Cir. 1996), the Eleventh Circuit (which sits in Atlanta) held that Title IX permits a claim for damages against a school arising from a sexually hostile environment created by a fellow student when the school knowingly fails to take action to eliminate the sexual harassment. The Court analogized to Title VII of the 1964 Civil Rights Act, which, inter alia, bars sexual harassment in the workplace. The Court said that a female student should no more be required to "run a gauntlet of sexual abuse ... to obtain an education" than a working woman should have to run a gauntlet of sexual harassment in order to earn a living. The court adopted the Title VII five-part test to determine school liability for the actions of students: (1) the plaintiff is a member of a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment was sufficiently severe or persuasive so as to alter the conditions of her education and create an abusive educational environment; and (5) some basis for institutional liability has been established. The Davis court found support for its holding in dicta by the Second Circuit's (which sits in New York) decision in Murray v. New York University College of Dentistry, 57 F.3d 243 (1994) and several district court decisions.

By contrast, in Rowinsky v. Bryan Independent School District, 80 F.3d 1006 (1996), the Fifth Circuit Court of Appeals reached an entirely different result. It held that Title IX does not impose liability on a school for student sexual harassment unless the school itself directly participates. The Court interpreted Title IX to place liability on the educational institution only if it directly discriminates against the student. In reaching its conclusion the court heavily relied upon its reading of the language and legislative history of Title IX as seeking to prevent discrimination by the recipients of Federal funds, not by fellow students.

Where a split between circuits such as that between the Davis and Rowinsky courts occurs, the United States Supreme Court normally resolves the issue. However, despite strong requests from many educational institutions and interest groups, the Supreme Court declined to grant Rowinsky's petition for a writ of certiorari.

Another significant decision is Wedding v. University of Toledo, 89 F.3d 316 (6th Cir. 1996). The facts are rather complicated, but the case demonstrates the deference to the labor arbitrator's jurisdiction shown by the federal courts. Plaintiff filed a grievance against her employer, the university, under a collective bargaining agreement. She alleged sex discrimination. The contract between the university and plaintiff's union provided that if a grievant sought relief in an outside forum, such as a court or the EEOC, the processing of the grievance would be held in abeyance until the outside agency issued a final determination, unless the university and union agreed to go forward with the grievance. Consequently, when the plaintiff filed a sex discrimination claim under Title VII and the Equal Pay Act, the university suspended the processing of her grievance.

The plaintiff then petitioned the United States District Court to compel the processing of her grievance. The court agreed, concluding that the labor contract's suspension provision is illegal because it allows the university to take an adverse employment action in response to her the Title VII claim. In making this determination, the court relied primarily on EEOC v. Board of Governors, 957 F.2d 424 (7th Cir. 1992), in which a similar provision was held to be invalid.

The university appealed to the U.S. Court of Appeals for the Sixth Circuit (which sits in Cincinnati). The appellate court did not reach the substantive question of whether the labor contract provision was legal because, it said, the District Court had decided the question prematurely. Relying upon the Steelworkers' trilogy, the Sixth Circuit ruled that the question of whether the grievance processing should be stayed should first be decided by a labor arbitrator applying the terms of the collective bargaining agreement.

The action of the court in Wedding demonstrates the differing attitudes toward labor arbitration that seem to be held by federal and state courts. Whereas, the former generally respect and defer to labor arbitration awards and the jurisdiction of labor arbitrators, the latter often scrutinize awards seemingly with the aim of protecting government entities from the adverse consequences of agreements that they have freely made.

The recurring problem of court interference with labor arbitration awards manifested itself in many cases decided in the last year, only two of which are discussed below. In Higher Education Coordinating Council/Roxbury Community College v. Massachusetts Teachers Association, 666 N.E.2d 479 (Mass. 1996), the Supreme Judicial Court of Massachusetts overturned an arbitrator's order requiring a college to create a full-time position and transfer an employee being laid off into it. A dramatic decrease in enrollment at the college resulted in a full-time faculty member being notified that he would be retrenched unless he could transfer into a full-time position in another department. He asked to be transferred into a position in the mathematics department that resulted from the retirement of a professor. The college had decided to cover the retired professor's courses with several part-timers and asserted that there was no full-time position for the retrenchee to transfer into. But an arbitrator found that the college had acted arbitrarily in not creating a full-time position for which the grievant could be considered and to which he would be entitled if qualified. The arbitrator went on to find that the grievant was qualified to teach those courses and that the college violated the contract by failing to create a full-time position and transfer the grievant into the job.

After a mid-level appellate court affirmed the arbitrator's award, the case was appealed by the college to the Supreme Judicial Court. That court overturned the arbitrator's award. Relying upon precedents developed in the context of elementary and secondary school cases, the court held that the college's decision on whether to create full-time or part-time positions was nondelegable because a school administration has unfettered discretion to make personnel decisions based upon changes in curriculum emphasis, fluctuating enrollments and resource availability. Therefore, it held that the arbitrator exceeded his authority when he found that the college violated the labor contract by failing to combine the part-time positions into a full-time position, and set aside the arbitrator's award.

Another intervention of courts into public employment arbitration awards is the decision of the New Jersey Superior Court Appellate Division in Union County College v. Union County College Chapter of the AAUP, 684 A.2d 511 (1996). In that case the college denied tenure to a faculty member, who then filed a grievance alleging that the tenure denial violated the settlement of a prior grievance involving his reappointment in a previous academic year. The grievance also alleged that the college had arbitrarily disregarded a positive tenure recommendation by a peer review committee, did not provide proper reasons for disregarding that recommendation, and did not properly apply reappointment criteria. The arbitrator ruled in favor of the grievant and ordered that tenure be granted.

Although the appellate court gave lip service to the familiar principle of court deference to arbitration awards, it went on to vacate the arbitrator's decision. In public sector arbitration, the court said, citing Scotch Plains-Fanwood Board of

Education v. Scotch Plains-Fanwood Education Association, 651 A.2d 1018 (N.J. 1995), an arbitrator may not construe a negotiated agreement to be inconsistent with a state statute. A public sector arbitration award may be vacated, it held, because of a mistake of law or where it contravenes the public policy applicable to the public sector negotiation process. The court found that a tenure decision is a "fundamental managerial prerogative" that "is not negotiable." An arbitrator may review a tenure decision only to determine if procedural violations have occurred. Where there are no procedural errors, the court held, the arbitrator has no power to set aside the college administration's tenure decision and has, in any event, no power to grant tenure. This case points up the lack of deference shown by some courts to public sector arbitrator's decisions. Here, the court scrutinized the arbitrator's findings and interpretations and unabashedly re-decided the case, even going so far as to overturn the arbitrator's finding that procedural violations occurred.

LEGAL ISSUES IN HIGHER EDUCATION

E. ANNUAL LEGAL UPDATE: AN ADMINISTRATION PERSPECTIVE

Nicholas DiGiovanni, Jr., Esq.
Morgan, Brown & Joy
Boston, MA

The past year has been a relatively quiet one in terms of major judicial decisions affecting collective bargaining and/or higher education. Trends developed in earlier years continued and there was, with few exceptions, little ground breaking news in the judicial arena. Nevertheless, a few developments are worthy of note.

GRADUATE STUDENTS AS EMPLOYEES

One area of development is the question of whether graduate students may have bargaining rights under the National Labor Relations Act. On January 31, 1997, the NLRB regional office in Hartford, Connecticut issued a complaint against Yale University alleging the institution had engaged in unfair labor practices against its graduate students during their "grade withholding" strikes in 1995 and 1996. The University had taken the position that the graduate students were not employees under the Act.

A hearing is scheduled for April 14, 1997. (Yale University and Graduate Employees and Students Organization, NLRB Region 34, Case No. 34-CA-7347).

The graduate student union is affiliated with the Hotel Employees and Restaurant Employees International Union.

The essence of the complaint is that the University had threatened the students with expulsion, negative letters of recommendation, loss of teaching assignments and other disciplinary actions for withholding grades during the Fall 1995 term.

The action of the regional office followed a ruling by the NLRB general counsel in November that he had accumulated sufficient evidence for a complaint to be issued.

This decision would seem to mark a decided reversal on the part of the NLRB with regard to its treatment of graduate students. For example, in Leland Stanford Junior University, 214 NLRB 621, 87 LRRM 1519 (1974), the Board found that graduate students who received stipends and grants to perform research for advanced degrees were not employees within the meaning of Section 2 (3) of the Act. Similarly, Adelphi University, 195 NLRB 639, 79 LRRM 1545 (1972).

In Adelphi, for example, the graduate assistants in question primarily taught laboratory courses in the science field under the charge of regular faculty members each of whom determined the content of his course and the grades to be given. The graduate assistants would grade lab work but these were submitted to the supervising faculty member who was free to ignore the grades in the final marking of the student.

All such assistants were expected to put in 20 hours a week on their assistantship duties for which they were paid $1200-2900 per year depending on their degree area, plus free tuition. The Board, in finding them to be students, wrote:

> The graduate assistants are graduate students working toward their own advanced degrees, and their employment depends entirely on their continued status as such. They do not have faculty rank, are not listed in the University catalogs, have no vote at faculty meetings, are not eligible for promotion or tenure, are not covered by the University's personnel policies, have no standing before the University's grievance committee and, except for health insurance, do not participate in fringe benefits available to faculty members.
>
> Unlike faculty members, graduate assistants are guided, instructed, assisted and corrected in the performance of their assistantship duties by the regular faculty members to whom they are assigned. 79 LRRM at 1548.

Similarly, in Leland Stanford, the research assistants in the physics department were found to be students and not employees within the meaning of the Act since the payments they received was more in the nature of stipends or grants to allow them to finish their advanced degrees and were not based on individual skill or function or the nature of the research performed. The Board noted that "the relationship of Stanford and the RA's is not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by an employer. Rather it is a situation of students within certain academic guidelines having chosen particular projects on which to spend the time necessary, as determined by the project's needs." 87 LRRM at 1521. The Board also noted that the RA's were not subject to disciplinary action if their work was unsatisfactory but would instead simply receive nonpassing grades.

The Board's view of graduate assistants and students was consistent with how the Board later treated interns and residents in hospital cases. In Cedars-Sinai Medical Center, 223 NLRB 251, 91 LRRM 1398 (1976), the Board decided that such individuals were primarily students and not employees and were not covered by the Act. See also, Kansas City General Hospital, 225 NLRB 108, 93 LRRM 1362 (1976); Samaritan Health Services, 238 NLRB 629, 99 LRRM 1551 (1978); St. Clare's Hospital and Health Center, 229 NLRB 1000, 95 LRRM 1180 (1977); University of Chicago Hospital and Clinics, 223 NLRB 1032, 92 LRRM 1039 (1976).

The general counsel has claimed that the Yale case is distinguishable from Cedars-Sinai as well as the Stanford and Adelphi cases because, among other factors, the Yale students do not simply receive a stipend to allow them to live while they get a degree; but rather, their compensation is directly tied to the number of hours they work. They are also supposedly treated more like employees than students in other areas. This is supposedly a case being decided on its peculiar facts and is not seen by the Board as a reversal of earlier precedent in either the hospital or college arena, nor does it mean that all private sector graduate assistants are now considered employees under the Act. When the full record is made, we will see how much truly distinguishes the Yale students from all others.

Of course, in the public sector, graduate employee bargaining has been authorized in many states and numerous large state systems bargain with such unions, including University of California-Berkeley (700 employees in 1994); Florida State University System (3650); University of Massachusetts (2000); University of Michigan (1603); Rutgers (1599); SUNY (3900); University of Oregon (1176) and University of Wisconsin (3074). See National Center's Newsletter, April 1994, Volume 22, Number 2.

According to the Coalition of Graduate Employee Unions, there are more than 100,000 graduate employees in the U.S. (Chronicle, March 7, 1997, A-13).

SUPREME COURT DECISIONS

This was not a year for major Supreme Court decisions in the labor and employment field. However, one decision that may impact on organizing efforts was decided by the Court in 1996. In NLRB v. Town and Country Electric, Inc., 116 S. Ct. 450 (1996), the Supreme Court held that paid union organizers who seek jobs with employers in order to organize employees from within are "employees" and entitled to the NLRA's full protection against discrimination. The case arose when a non-union contractor advertised for workers to begin a new project. Two full-time salaried union officials and nine unemployed union members, who were induced to apply by the union's promise that it would pay them extra to conduct union organizing activity, applied for the job. The employer would not even interview these candidates.

The employer argued that such individuals were not "employees" within the meaning of the National Labor Relations Act. The Board rejected this argument and found that the employer was motivated by anti-union considerations and was in violation of Section 8(a) (3) of the Act. The Eighth Circuit Court of Appeals disagreed with the Board and found that the individuals involved were not statutory employees because they had a conflict of interest. Since several other circuits had split on the question, the Court granted cert.

The Supreme Court upheld the Board and, in a unanimous opinion, found that the paid union organizers were indeed employees under the Act and were entitled to its protections. The Court noted that the employees met every common law test of employee and that the statutory definition under the Act provided no safe haven for the employer's argument for exclusion. With regard to the argument that there was a conflict of interest in having paid union organizers on the payroll, the Court observed that, however disloyal an employer may consider an organizing employee to be, the law specifically gives employees the right to organize, "thus establishing as a matter of law that there is no conflict between giving an employer an honest day's work and simultaneously engaging in organizing activities."[1]

As unions begin exploring new methods of organizing, including "salting" techniques, this decision confirms that such "salts" will have the protection of the Act behind them if the employer takes any action based upon their union affiliation.

One major employment discrimination case was decided with O'Connor v. Consolidated Coin Caterers Corp., 116 S.Ct 1307, 70 FEP Cases 486 (1996), where the Court held that a plaintiff in an Age Discrimination in Employment Act case need not show that he or she was replaced by someone outside the protected age group. The employer had argued that since a 56 year old plaintiff was replaced by a 40 year old, the plaintiff could not establish a *prima facie* case of discrimination. The Court noted that because one person in the protected age group lost out to another in the protected age group does not matter so long as he lost out because of his age.

NLRB AND THE EFFECT OF MANAGEMENT RIGHTS CLAUSES

One area worth reviewing from the context of trends that affect bargaining is the question of whether and to what degree an employer can preserve the right to take unilateral action during the life of a collective bargaining agreement. This, of course, is often one of the most contested areas of negotiations between employers and unions, as employers try to avoid mid-contract bargaining by the use of strong management rights clauses and zipper clauses.

In recent years, and continuing into 1996, the NLRB has taken a very strong position that management rights clauses and zipper clauses that would seem to leave management with unilateral authority in many areas during the life of a contract are not as effective as they would seem, and that despite such clauses, unions are often successful in demanding mid-term bargaining when management plans to take a particular action it thought it had the right to take unilaterally.

As we all know, management has the obligation to bargain over "wages, hours and other terms or conditions of employment." This obligation continues during the life of a contract as well unless the duty has been waived. NLRB v. Jacobs Manufacturing, 194 F. 2d 680 (2nd Cir., 1952). In determining whether a union has waived its right to bargain over an item during the term of a collective bargaining agreement, the NLRB will ask whether the waiver was "clear and unmistakable," citing the Supreme Court in Metropolitan Electric Co. v. NLRB, 460 US 693 (1983). Usually such waivers can be gleaned from the express provisions of the contract, or by the parties conduct, such as bargaining history or past practice, or by some combination.

However, the Board in its decisions in recent years has given less and less attention to the contract language and more to extrinsic evidence that might suggest that a union has not given up its right to bargain.

Employers have traditionally argued that when the contract discusses the matter in question, then the Board should apply the "contract coverage" test and find that a waiver must have occurred. Some of the circuit courts have agreed with this interpretation. See, for example, Local Union No. 47 IBEW v. NLRB, 927 F. 2d 635, (D.C. Cir. 1991); Chicago Tribune Co. v. NLRB, 974 F. 2d 933 (1992), where the court said:

> Of course people should not be tripped into foregoing valuable rights, but where... a union agrees to a broadly worded management rights clause, the scope of that clause depends on the usual principles of contract interpretation rather than on a doctrine that tilted in the union's favor...Unions employ experienced contract negotiators, who do not need special rules of construction to protect them from being outwitted by company negotiators.

The NLRB, however, has not followed this logic. For example, in Exxon Research and Engineering Company, 317 NLRB 675 (1995), enf'd denied 89 F. 3d 228 (5th Cir., 1996), the Board found unlawful unilateral action when an employer changed certain provisions of a thrift plan under which employees could exercise investment options through payroll deductions which Exxon matched up to a certain limit. The contract referred to the thrift plan and indicated that, along with several other programs, the thrift plan "would be governed by its own provisions." The Board found the language ambiguous and found no clear and unmistakable waiver.

In Owens-Brockway Plastics Products, 311 NLRB 519 (1993), the Board found no waiver of the union's right to bargain over plan relocation despite a detailed management rights article which left the employer with the right to "increase or decrease operations" among other rights. The Board noted the absence of any specific language on plant relocation and felt that the phrase "increase or decrease operations" was too vague to constitute a clear and unmistakable waiver.

In KIRO Inc., 317 NLRB 1325 (1995), the union claimed the employer could not institute a 10:00 pm news show which resulted in increased hours and split shifts without bargaining with the union. The Board agreed, despite management rights language which stated:

> The management of the business and the direction of the workforce, including the right to plan, direct and control station operations; the right to hire, schedule, assign work, retire, demote, suspend, transfer or discharge; the right to discipline for just cause; the right to determine the means, methods, processes and schedules of production the right to determine the products to be manufactured or services to be performed; the right to determine whether to make or buy; the right to determine the location of stations and the continuance of any department; the right to establish production standards in order to maintain efficiency of the employees; are rights belonging to the company and are not subject to the grievance procedure.

The Board nonetheless found this language insufficient to secure a unilateral right for management to establish the news program.

In these and other cases, the Board has been very reluctant to find a bargaining waiver based upon detailed management rights articles and zipper clauses. See also, Trojan Yacht, 319 NLRB 741 (1996).

The effect of this trend will be felt most pointedly at the bargaining table. In many situations, management will negotiate detailed management rights articles, often making valuable concessions to do so, in the expectation that it will have more freedom of action during the life of the contract. At the very least, this line of decisions may cause some employers to pause before assuming that certain language will give them the clear right to unilaterally act.

MANDATORY ARBITRATION OF STATUTORY EMPLOYMENT CLAIMS

One of the busiest issues in the employment field remains the degree to which an employer can force an employee to submit his or her claims of statutory discrimination to private arbitration instead of the courts. In the wake of the Supreme Court's 1991 decision in Gilmer v. Interstate Johnson Lane, 111 S.Ct 1647, which upheld a mandatory arbitration provision which prevented an employee from filing an age discrimination suit in federal court, more and more courts are upholding mandatory submission to arbitration. In 1996, this trend continued.

In the collective bargaining text, the lead decision remains Alexander v. Gardner-Denver, 94 S.Ct. 1011 (1974) in which the Supreme Court held that Title VII gave employees a right to a judicial trial which is not foreclosed by prior submission to arbitration of a grievance over the same issue. However, in 1996, the Fourth Circuit, more enamored of Gilmer than Gardner-Denver, held that an employee could not file a sex and disability discrimination action in federal court until she had exhausted her internal remedies under the collective bargaining agreement. Austin v. Owens-Brockway Glass Container Inc., 78 F.3d 875 (4th Cir., 1996). The Supreme Court denied certiorari. The Fifth Circuit in Reece v. Houston Lighting and Power Co., 79 F.3d 485 (5th Cir., 1996) also followed the same reasoning of Austin and held that an employee's race discrimination and intentional infliction of emotional distress claims were subject to a collective bargaining agreement's mandatory arbitration clause. See also Jessie v. Carter Health Care Center, 1996 U.S. Dist. LEXIS 10021, 930 F. Supp. 1174 (D. Ky., July, 1996) (same result, with court noting that an agreement to arbitrate procured by a union in a collective bargaining agreement should not be treated differently than an individual agreement to arbitrate. Unions can bargain away the right to strike on behalf of their members; they can also bargain away the choice of forums for litigating discrimination cases. Compare, however, Bates v. Long Island Railroad Co., 997 F.2d 1028 (2d Cir., 1993) where the Court held that prior arbitration under a collective bargaining agreement of disability claims did not preclude plaintiffs from bringing the same claims into court. The Second Circuit relied on Gardner-Denver.

Mandatory arbitration in the collective bargaining realm is likely to be a growing source of litigation as litigants test the waters as to which of the two Supreme Court precedents -- Gilmer or Gardner-Denver -- should rule.

In non-union settings, however, the answers seem to be clearer as more and more courts uphold private arbitration agreements between employers and employees. In 1996, the Seventh Circuit ruled that a plaintiff's age discrimination claims were subject to a mandatory arbitration clause in an employment agreement and could not be filed in court. Matthews v. Rollins Hudig Hall Co., 72 F.3d 50, 69 FEP Cases 641 (7th Cir., 1996). See also Williams v. CIGNA Financial Advisors, 56 F.3d 656, 68 FEP Cases 65 (5th Cir., 1995) upholding private arbitration agreement. Willis v. Dean Witter Reynolds, 948 F.2d 305 (6th Cir. 1991) (same result); Nghiem v. NEC Electronics, Inc., 25 F.3d 1437 (9th Cir., 1995) (same result); Kidd v. Equitable Life, 32 F.3d 516 (11th Cir., 1994) (same result).

In contrast to this trend, the National Labor Relations Board has ruled that an employer cannot force an employee to sign a mandatory arbitration clause which would force the employee to take all of his or her NLRA claims to arbitration. In the Matter of Bentley's Luggage, NLRB 12-CA-16658, NLRB Advice memorandum (August 21, 1996). In that case, an employee had been fired for refusing to sign such an agreement. A critical difference in Bentley, which interpreted the NLRA, compared to the Gilmer line of cases interpreting Title VII, ADEA and ADA is that the National Labor Relations Act has specific language in Section 10(a) which states that the power of the NLRB to enforce the Act "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise." Such language would seem to preclude any mandatory arbitration provision which forces an employee to submit NLRA disputes to a private arbitrator rather than the Board.

HEALTH INSURANCE ARBITRATION DECISIONS

An important decision in the benefit arena was decided in Grievance of Majors et al, 19 VLRB 375 (Dec. 31, 1996). In that case, several staff employees of the Vermont State Colleges had filed grievances under their union contract claiming that their medical insurance coverage had been changed because the Colleges' new carrier, Blue Cross, had denied certain discretionary medical claims that the previous carrier, CIGNA, had approved. While conceding that the Colleges had the right to change carriers, and while also conceding that the basic health plan had not changed, the grievants, nonetheless, felt that since the same claims approved by CIGNA had been denied by Blue Cross, then a unilateral change in benefit had occurred.

The case went to the Vermont Labor Relations Board which acts as the statutory arbitrator for all grievances of state employees under 3 V.S.A. sec. 901 et seq.

The Colleges moved to dismiss the grievance on the grounds that it was not the decision-maker. In essence, the Colleges argued that a grievance must be directed against an action of the employer; this grievance was not. It had long been the practice within the system that the Colleges would play no role in the processing, approval or denial of medical claims. These decisions were left up to the carrier, and if there was a denial of a claim, the carrier, whether Blue Cross or CIGNA, had provided an internal appeal process which could culminate in an independent lawsuit.

The Board agreed, and in a split decision, held that the grievance must be dismissed. The Board wrote:

> The Contract does not contain specific contract provisions which warranted resort to the grievance procedure to contest denial of individual claims; instead, it simply provides for the maintenance of the existing health insurance plan during the life of the Contract. The historical experience and contractual provisions demonstrate an apparent tacit understanding between the parties to have claim reviews and appeals decided by a third party [i.e. the carrier]. In fact, to do otherwise would open the door for a breach of patient confidentiality between patient and provider by bringing the employer in the process. One cannot responsibly assume that the parties would not enter into such an arrangement except after careful consideration and negotiations, if at all and that such a provision, if agreed to, would be well documented rather than implied...We decline to insert ourselves into the medical claims process in such a way, believing that to do so

> is beyond our grievance jurisdiction. If we were to rule otherwise, we would be placing ourselves in a position of doing precisely what Grievants claim this grievance is not about -- i.e. making medical necessity determinations. 19 VLRB at 380-381.

This is an area of arbitration law which may become more litigious as employers try as best they can to cut health care costs. Frequently, sending the health care package out to bid can yield real savings for employers, but in the wake of a changeover to a new carrier, there may be a number of questions about whether the essence of the coverage has changed. A new carrier who more stringently interprets phrases like "medical necessity" may be able to cut costs for an employer -- but the employer may then be subject to charges that the health insurance itself has changed. The Vermont decision is one of a very few in this area.

In Kuzich v. Employee Trust Funds, 553 N.W.2d 830 (Wis. App. 1996), a state university's denial of its employee's application for family coverage under the state group health insurance program on the grounds that his wife already had coverage through her employer -- The Wisconsin Housing and Economic Development Authority -- was not an act of marital status discrimination. Court reviewed legislative history of both the discrimination statute and legislation which restricted options for public employees in the health insurance area.

In Siegal and Bradley v. Vermont State Colleges, 19 VLRB 343 (1996), the Vermont Labor Relations Board, again acting as the statutory arbitrator, held that the Colleges were not required under the collective bargaining agreement to offer faculty members the choice of having either individual health insurance coverage or family or two person coverage, when those faculty members are married to other College employees. Requiring that married College employees be treated as a family unit for purposes of selecting an indemnity or managed care plan, and that they be united in a two-person or family coverage plan rather than two plans, is not a policy inconsistent with any provision of the collective bargaining agreement, nor is it arbitrary or capricious. The Board wrote:

> There is no effective loss of a choice of plans [for the faculty members involved]. The choice must simply be exercised on a collective basis with one's spouse, rather than on an individual basis. This is consistent with many economic and personal decisions made in married life. 19 VLRB at 355.

MISCELLANEOUS DECISIONS OF NOTE

In Union County College v AAUP, 684 A. 2d. 511 (N.J. Super., A.D., 1996), the Appellate Division of the New Jersey Superior Court held that an arbitrator had exceeded his authority in ruling that the College had violated the collective bargaining agreement when it denied tenure to an assistant professor. The arbitrator was limited

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to review of procedure, none of which was violated. His disagreement with the substantive decision to deny tenure based on the criteria was beyond his authority. The failure of the College to more clearly articulate the reasons for the tenure denial was not a matter of procedure but of substance -- and therefore, beyond the review of the arbitrator.

In Matthews v. University of Alaska, 925 P.2d 1052 (Alaska, 1996), it was found that the University Grievance Council did not abuse its discretion in denying as untimely a request from a former professor for a hearing on the issue of determination of his period of service with the University, since his request was made 80 days past the deadline for filing such an appeal. The University is entitled to reasonable enforcement of its time deadlines for the grievance procedure.

In California State Employees Association v. PERB, 59 Cal. Rptr. 2d 488 (1996), the court held that the action of a state university in discontinuing the practice of awarding merit salary adjustments as required by previous collective bargaining agreements with the union constituted unilateral action in violation of the law. While the contract had expired, the university was obligated to continue such merit awards as well as other terms and conditions arising under the agreement.

United Auto Workers v. Central Michigan University, 550 N.W.2d 855, Mich. 1996): Under Michigan law, release time for union officers is a mandatory subject of negotiations and cannot be unilaterally terminated even though the collective bargaining agreement expired. Release time was a mandatory subject of bargaining and like others, must be continued even though the contract expired.

In Chauffeurs, Teamsters, Warehousemen, Helpers Union Local 597 and University of Vermont, 19 VLRB 64 (1996), a unit limited to the Police Services Department was found to be appropriate under the Vermont State Employees Labor Relations Act, despite the fact that the police had identical benefits as other non-faculty employees, were subject to the same salary scale, worked under the same Handbook and precisely the same terms and conditions of employment and policies of the University as other employees, and often interacted with other employees in the performance of their duties. The Board rejected the University's argument that only a campus-wide unit of all non-professional staff would be appropriate. The Board emphasized the special nature of police work, even on a university campus, which justified separate unit status to the group. (The police subsequently voted for the union and the unit case is now on appeal to the Vermont Supreme Court).

In University Professional Local 4100 v. Edgar, 153 LRRM 2442 (D. ND. Ill., 1996), a state statute which amended the Illinois Educational Labor Relations Act to require that the "sole appropriate bargaining unit at the three campuses of the University of Illinois shall be a unit of nonsupervisory academic faculty at all the schools" was deemed constitutional, despite the fact that it had the effect of nullifying a pre-existing separate campus unit at one of the schools.

In Community College District No. 509 v. Illinois ELRB, 151 LRRM 2661 (Ill. App. Ct., 1996), it was found that a Board decision adding regular part-time faculty (those teaching at least 12 credits a year) to a unit of full-time faculty was appropriate.

In Uni-United Faculty v. Iowa PELB, 153 LRRM 2089 (Iowa, 1996), the Labor Board properly determined that the University did not violate its duty to bargain when it refused to negotiate over the distribution of a special legislative appropriation of $275,000 earmarked for teaching excellence. The legislature had passed this particular bill in question in the second year of the parties' two-year contract and indicated that there should be $275,000 devoted to teaching excellence in the University system. The University argued that this was not additional money and that the $275,000 was already a portion of the previously negotiated two-year deal. The Court disagreed with the union contention that the money was to be "over and above" the regular appropriation or that it was to be over and above the previously negotiated contract provision on salary.

And in my personal favorite of the year, an arbitrator ruled in Oakland University, 106 LA 872 (Daniel, 1996) that the University violated the collective bargaining contract when it ended the union president's parking privileges. The contract had specified that the president may have up to 20 hours per week to investigate grievances and requiring him to walk around the university instead of driving amounts to a reduction of his available time for representation activity. Parking privileges had been a past practice and despite a zipper clause in the agreement, the practice had to be continued. The university was also required to pay the president's parking fines.

ENDNOTE

1. See Michael Gottesman, "Labor, Employment & Benefit Decisions of the Supreme Court's 1995-96 Term," The Labor Lawyer, (Vol. 12, No. 3).